90-1027

No. 90-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1990

HELEN JEAN GUERCIO,

Petitioner,

v.

GEORGE BRODY

and

JOHN FEIKENS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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December 1990

QUESTIONS PRESENTED

1. Can a federal judge seeking qualified immunity reasonably conclude that certain speech is not protected when that speech consists of a public employee's distribution of newspaper articles published eleven years previously containing information highly relevant to the current qualifications of an attorney nominated amidst public controversy to replace a disgraced judge in a corrupted federal court?

2. Can a federal judge faced with (1) a competent and loyal secretary's protected speech on a matter of grave public concern, and (2) a judge-nominee's tempermental threat not to work with that judge unless he fires the secretary for her protected speech, reasonably conclude that the integrity and efficiency of the federal judiciary would be furthered by acquiescing in the threat and firing the secretary?

3. May a federal court of appeals, ruling upon the allegations of an unanswered complaint, base its determination of qualified immunity upon a plain misstatement of material factual allegations, upon inferences contrary to specific factual allegations, and upon inferences favoring the defendant judges rather than the plaintiff public employee?

PARTIES TO THE PROCEEDING

The following parties appeared before the United States Court of Appeals for the Sixth Circuit:

1. Petitioner:
   Helen Jean Guercio

2. Respondents:
   George Brody
   John Feikens

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Helen Jean Guercio petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in this case on August 13, 1990 and September 25, 1990.

OPINIONS BELOW

The order of the Court of Appeals denying Helen Guercio's petition for rehearing and suggestion for rehearing *en banc* (App., **infra**, 1a) is reported at __ F.2d ___ (6th Cir. 1990). The opinion of the Court of Appeals (App., **infra**, 3a) is reported at ___ F.2d ____ (6th Cir. 1990). The opinion and order of the district court appealed to the Court of Appeals (App., **infra**, 30a) are unreported.

This case has generated other reports of opinions not germane to the present petition. Petitioner's claim had originally been dismissed on absolute immunity grounds by the district court in proceedings on July 10, 1985 and in an unreported order of August 6, 1985 (App., **infra**, 43a). That dismissal was reversed by decision of the Court of Appeals (App., **infra**, 49a), reported at 814 F.2d 1115 (6th Cir. 1987). That decision was originally vacated in part by order (App., **infra**, 60a), reported at 823 F.2d 166 (6th Cir. 1987), but subsequently reinstated by order (App., **infra**, 63a) reported at 859 F.2d 1232 (6th Cir. 1988). The denial of George Brody's petition for writ of certiorari on the question of absolute immunity is reported at 484 U.S. 1025 (1989).

The Federal Circuit denied jurisdiction of an appeal by respondent Brody in an opinion (App., **infra**, 65a) reported at 884 F.2d 1372 (Fed.Cir. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1990. A timely petition for rehearing was denied on September 25, 1990 (App., **infra**, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

The factual record in this case is limited to the facts alleged in an amended complaint filed by petitioner in the district court in June 1988 (App., **infra**, 69a). On the basis of the unanswered factual allegations of petitioner, the court of appeals held that respondent judges were entitled to qualified immunity. Those facts are as follows.

Beginning in 1979, Helen Guercio was employed for close to three years by Detroit Bankruptcy Judge George Brody as his legal secretary, performing in a competent and professional manner, fully recognized by Judge Brody (Second Amended Complaint, App., **infra**, 70a, paras. 6-7). In late 1979, Mrs. Guercio discovered evidence of corruption in the Bankruptcy Court (App., **infra**, 71a, paras. 8-9), and informed both Judge Brody and the Chief Judge of the District Court, John Feikens, both of whom refused at the time, and for some ten months thereafter, to act on the information disclosed to them by Mrs. Guercio (App., **infra**, 71a-72a, paras. 10-12).

Mrs. Guercio persisted in her efforts to expose corruption in the Bankruptcy Court, reporting her information in

May 1980 to appropriate personnel in the Administrative Office of the United States Courts ("AO"), in Washington, D.C. She was, however, informed that respondent Judge Feikens refused consent to an AO investigation of the corruption observed and revealed by Mrs. Guercio (App., **infra**, 71a-72a, para. 11). In October 1980, Judge Feikens finally consented to an AO investigation, and from October 1980 through June 1981, Mrs. Guercio cooperated in the investigation, disclosing information which led to the resignation of a Bankruptcy Judge and the criminal convictions of an attorney, a clerk, and the Chief Clerk of the Bankruptcy Court (App., **infra**, 72a-73a, para. 15).

In the summer of 1981, shortly after the resignation of Bankruptcy Judge Harry G. Hackett pursuant to Mrs. Guercio's exposure of corruption, a committee of federal district court judges nominated George Woods to replace Judge Hackett. That nomination generated public controversy, was widely criticized and defended, and was the subject of extensive media coverage (App., **infra**, 73a, para. 17). Mrs. Guercio learned that nominee Woods had eleven years previously, in 1969, been nominated to become the United States Attorney, but his nomination had been withdrawn after critical publicity regarding his representation of, and contacts with, reputed organized crime or racketeering figures (App., **infra**, 73a, para. 19). Mrs. Guercio disclosed this information to the nominating committee and to others during the period Woods was under consideration for appointment to the Bankruptcy Court (App., **infra**, 74a, para. 20). The information disclosed by Mrs. Guercio consisted of newspapers articles published in 1969 describing the previous Woods nomination controversy.

There is no allegation, nor anything in the record, indicating that Woods' previous failed nomination, or the circumstances and 1969 publicity surrounding it, had ever been investigated by, or was even known to, those with nominating, reviewing or selecting authority regarding nominee Woods. Moreover, Mrs. Guercio distributed the information while the Woods' nomination was still under consideration.

Soon after Mrs. Guercio's distribution of the 1969 newspaper articles, nominee Woods informed Judge Brody that because Mrs. Guercio had distributed information about Woods' prior failed nomination, he would, if appointed, refuse to work with Judge Brody unless Judge Brody fired Mrs. Guercio (App., **infra**, 74a, para. 21). Judge Brody took nominee Woods' threat to Judge Feikens, who demanded that she be fired (App., **infra**, 74a, paras. 21, 23). Judges Brody and Feikens fired Mrs. Guercio on October 16, 1981. Mrs. Guercio's complaint asserts that she was fired because of her successful efforts in exposing corruption and her distribution of the information concerning nominee Woods.

Judges Brody and Feikens were not motivated in firing Mrs. Guercio by any existing disruption or disharmony created by her disclosures (App., **infra**, 75a, para. 27). They fired her solely in retaliation for her exposure of corruption in their court and her embarrassing disclosures regarding the new nominee, which had caused the nominee to threaten that he would himself create disruption unless the judges met his demand that they retaliate against Mrs. Guercio.

Mrs. Guercio's disclosures regarding corruption had not resulted in disrupting her work on Judge Brody's staff, nor had any disruption occurred in the work of the new Judge since he had not yet been appointed at the time Mrs. Guercio was fired (App., **infra**, 75a, para. 26). At no time had Mrs. Guercio criticized Judge Brody or Judge Feikens, nor had she ever personally criticized Judge-nominee Woods. Her activities concerning Woods were limited solely to disclosures of newspaper articles containing information relevant to the concerns of a nominating committee (App., **infra**, 74a, para. 25).

Mrs. Guercio originally filed her claim that she had been fired in violation of her First Amendment rights to speak out on matters of public concern against Judges Brody and Feikens, in their personal and official capacities, seeking damages from them personally, and equitable reinstatement by them in their official

capacity. The district court dismissed her entire amended complaint solely on the grounds of absolute immunity. The Court of Appeals for the Sixth Circuit reversed this dismissal and the judges then moved separately for dismissal on grounds of qualified immunity, which motions the district court denied. Judge Feikens appealed his denial to the Court of Appeals for the Sixth Circuit; Judge Brody appealed his denial to both the Court of Appeals for the Federal Circuit and the Court of Appeals for the Sixth Circuit. The federal circuit refused jurisdiction, and the sixth circuit heard and decided both appeals as one.

The Court of Appeals for the Sixth Circuit, by a two-to-one panel decision held both judges were entitled to qualified immunity, reversed the denial of the judges' motion to dismiss them as defendants in their personal capacity and remanded to determine whether any equitable claims against them in their official capacity remained. The parties have stipulated to dismiss all claims against the respondents in their official capacity.

The panel's majority opinion concedes that a reasonable federal judge could not have failed to recognize that Mrs. Guercio could not constitutionally be fired under the circumstances "up to the point at which Guercio circulated the dated news articles critical of Woods" (App., **infra**, 16a). However, the majority held a reasonable judge could conclude Mrs. Guercio's disclosure of the eleven-year-old articles was not protected speech (App., **infra**, 16a,22a). The majority panel further concluded that, given the "central and indispensable" concern for harmony and collegiality among judges (App., **infra**, 20a), a reasonable judge could determine it would be constitutionally appropriate to fire Mrs. Guercio in the face of a nominee's "bitter resentment" and threat to refuse to work with Judge Brody if Mrs. Guercio were not fired (App., **infra**, 15a).

Mrs. Guercio sought rehearing from the court of appeals on the dismissal of her *Bivens*[1] claims against the judges in their personal capacity, which was denied, leading to this petition.

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[1] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

REASONS FOR GRANTING THIS PETITION

I.
QUESTIONS OF EXCEPTIONAL IMPORTANCE ARE PRESENTED

This case arises from what the court of appeals has characterized as an "unfortunate chapter" of court corruption in the Eastern District of Michigan, a chapter that generated intense public interest and media scrutiny. Helen Guercio, the court employee who exposed the corruption, was never promoted, rewarded or otherwise recognized by the court for her efforts. Instead, she was fired while the court was still attempting to correct itself and while its efforts were still the subject of intense public and media interest, scrutiny and controversy.

Because this case arises from a corrupted federal court and because it involves the extent to which judges are immune from the consequences of their unconstitutional conduct, Mrs. Guercio's complaint of retaliatory firing presents issues of exceptional importance.

The course of litigation in this case presents a further indication of the importance of the questions presented. Her complaint has been before the Court of Appeals for the Sixth Circuit twice and before the Court of Appeals for the Federal Circuit once (App., **infra**, 3a, 49a, 65a). Further, the Court of Appeals for the Sixth Circuit, at defendant Feikens' request, granted and then vacated rehearing *en banc* in the previous appeal. Mrs. Guercio's complaint, which has been the subject of scholarly and media attention,[2] presents "very difficult" questions (App., **infra**, 26a) which, in a third appearance before a Court of Appeals, with Mrs. Guercio as appellee, generated a decision with majority and dissenting opinions (**Id.**).

Apart from the importance which the questions presented

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[2]Cf., Robert S. Glazier, "An Argument Against Judicial Immunity for Employment Decisions," 11 Nova Law Review 1127 (1987).

assume because of the history of and public and scholarly interest in this case and the events surrounding it, the questions presented are of exceptional public importance, because of the difficulty and extraordinary character of the developing federal common law doctrine of immunity for judges and public officials. In holding the judges immune from the consequences of their retaliation, the panel's majority opinion misapplies a *Pickering* balancing test to an unanswered complaint, and has to rely on inferences which are either not available or favor the defendants rather than plaintiff.

In its unique finding of qualified immunity on the part of judges who have yet to even deny the detailed allegations of a complaint which states a *Bivens* cause of action, the panel's majority opinion effectively reinstates absolute immunity and creates a vast gulf between judges and public officials on the one hand and the rest of society on the other. While all other citizens, no matter how important their decisions might be to the proper functioning of society, must answer to the judiciary for their actions, judges are to be exempted from even denying detailed charges of First Amendment violations, even where their actions are administrative rather than judicial.

Given that this is a case against judges and arises out of events occurring in a once-corrupt federal court, the question to what extent the judiciary branch exempts itself from constitutional burdens it has placed upon the rest of society is one of extreme importance.

II.
ANY REASONABLE JUDGE WOULD RECOGNIZE THAT MRS. GUERCIO'S SPEECH WAS ENTITLED TO SPECIAL PROTECTION. NO REASONABLE JUDGE WOULD HAVE ACQUIESCED IN THE FACE OF NOMINEE WOODS' EXTRAORDINARY THREAT.

The Court of Appeals for the Sixth Circuit has concluded that "a competent judge in the position of Judge Feikens could have reasonably...questioned if the circulation of the dated news accounts constituted an expression of speech protected by the first amendment" (App., **infra**, 20a). In so concluding, the majority decision evinces a distressingly low opinion of the ordinary, prudent federal judge's competence.

Nominee Woods was to replace a disgraced judge in a corrupted court. The nominee had, eleven years previously, had his nomination to high public office withdrawn during a much publicized controversy over his being ethically qualified for high public office. Nothing in the record before the court of appeals indicates that those charged with deciding upon the nomination were aware of the former controversy or knowledgeable as to the underlying facts. Nor was anything in the record before the court as to the already aroused public's knowledge as to the ethical concerns raised eleven years previously. The court fails to note the great relevance of the previous controversy to that arising eleven years later. The court limits its characterization of Mrs. Guercio's speech as being "circulation of dated news accounts."

No reasonable federal judge could question whether such speech was an expression of speech protected by the First Amendment. Any competent federal judge would recognize that speech on public issues occupies "the highest rung of the hierarchy of First Amendment values." *NAACP v. Clairborne Hardware*, 458 U.S. 886, 913 (1982). It is beyond argument that the nominee's background and qualifications were a matter of grave public concern. And public scrutiny thereof, not just in-house judge scrutiny, was also of grave public concern and

essential to restoring public confidence in the corrupted court. No reasonable judge would fail to recognize Mrs. Guercio had a claim of great protection. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Meyers*, 461 U.S. 138 (1983).

The majority opinion of the court of appeals next asserts that a reasonable federal judge might acquiesce in a firing otherwise unconstitutional because of the extraordinary threat of a nominee that, if appointed, he would not work with a fellow judge. The majority concedes that bankruptcy judges working together was a "central and indispensable" concern, yet concludes it would be reasonable to allow an incoming nominee to threaten not to work with another judge. The majority fails to explain how the efficiency of the service is furthered by acceding to a threat to create disruption if demands for retaliation against protected speech are not met.

Petitioner asserts that no reasonable judge would have fired Mrs. Guercio on the basis of nominee Woods' threat. The only reasonable response under the circumstances presented by Mrs. Guercio's complaint would be to explain to nominee Woods that he should expect and welcome public scrutiny of his prior failed nomination, that such public scrutiny was important to restoring public confidence, that public employees were entitled to forward or publicize any information concerning his background, particularly where they refrained from personal criticism. Any reasonable judge would further explain that to refuse to work with another judge would be highly improper and would be a violation of one's oath of office. And, finally, any reasonable judge would have refused to fire a competent secretary under such circumstances.

No reasonable judge would fail to recognize that the true source of threatened disruption was nominee Woods, not Mrs. Guercio's distribution of the highly relevant information contained in old newspaper articles. The harmony obtained by placating an unconfirmed nominee making a threat that, if carried out, would constitute a violation of a judge's oath of office, is not the type of harmony that promotes the efficiency of

the judiciary branch. If it is not constitutional for one judge to fire a public employee for protected speech, it does not become so when a second judge threatens not to work unless the first judge does fire her for that speech.

By any objective measure Mrs. Guercio's rights to free speech were so evident from pre-existing law when she was ordered fired by Judge Feikens that he was under an affirmative duty to refrain from such conduct. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987). To conclude otherwise would be to authorize third party threats of disruption as an effective and constitutionally permissible tool to silence public employees from speaking out on matters of grave public concern.

III.
THE COURT BELOW COMMITS WHOLESALE VIOLATION OF ITS DUTY TO RELY EXCLUSIVELY UPON THE ALLEGATIONS OF THE COMPLAINT.

The majority opinion misstates the factual allegations of the complaint, infers facts contrary to those alleged, and repeatedly chooses inferences favoring defendant-respondents rather than the plaintiff-petitioner. In doing so, the court violates the requirement to decide issues of law exclusively on the allegations of the unanswered complaint, which, having not been denied, must be accepted as true. *See, Hishon v. King and Spaulding*, 467 U.S. 69, 73 (1989); *Walker Process Equipment, Inc. v. Food Machinery and Chemical*, 382 U.S. 172, 174-175 (1965).

1. Misstatement of fact.

In holding a competent federal judge could reasonably conclude Mrs. Guercio's distribution of information concerning Judge Woods' qualifications was not protected speech, the majority opinion asserts that there existed "disharmony precipitated by Guercio's distribution of dated news articles, which disharmony Guercio has conceded affected to some degree the operation of the Bankruptcy Court..." (App., infra, 19a). This assertion is a plain misstatement of the pertinent allegations in Mrs. Guercio's complaint:

> Plaintiff's distribution of the newspaper articles *had not caused any disruption* in her performance of her duties or her ability to work with others in the course of performing her duties.... With respect to Woods, *no disruption* of the workplace could have occurred, since Woods' nomination was still pending....

(App., **infra**, 75a, para. 26 [emphases added].) The majority opinion thus mistakenly matches allegations of "minor" disruption from earlier exposures of corruption with the totally unconnected later distribution of information concerning nominee Woods, thereby mistakenly concluding her distribution had "affected to some degree the operation of the Bankruptcy Court" (App., **infra**, 19a).

Mrs. Guercio has asserted exactly the opposite. Woods had not been appointed. His nomination was publicly controversial even before Mrs. Guercio distributed her information. And nothing in the record indicates that the operation of the Bankruptcy Court was actually affected in any manner whatsoever. Thus, in its attempt to apply a *Pickering* balancing test to Mrs. Guercio's unanswered allegations, the court improperly assumes existing disruption which in fact was alleged *not* to exist.

2. Assumption of fact not in the record.

The majority opinion erroneously assumes knowledge of Judge Feikens' subjective motivations, an assumption not justified by the record and not appropriate to a determination of objectively reasonable conduct by a Chief Judge exercising authority over personnel decisions. The opinion asserts "Judge Feikens' desire to prevent [internecine] conflict was both genuine and compelling" (App., **infra**, 15a). Nothing in the record evidences Judge Feikens' subjective desires. And, given his initial ten-month refusal to act on information evidencing corruption, and his acquiescence in an unseemly threat by a nominee, inferences favoring Judge Feikens should only be drawn where compelled by the factual allegations of the complaint.

3. Misstatement of fact; assumption of facts not in the record.

The majority opinion asserts that the appointive procedures "had been exhausted to completion" when Mrs. Guercio distributed her information concerning Woods' previous nomination problems (App., **infra**, 19a). The majority opinion then, remarkably, concludes that since the newspaper articles were "of public record" and since there was nothing "newly discovered" and Mrs. Guercio didn't attest to the articles' accuracy, that a competent federal Chief Judge could conclude her speech was unprotected (**Id.**)

There is nothing in the record justifying the assertion that the appointive process was "exhausted to completion." The complaint alleges, to the contrary, that the nomination was still "under consideration" (App., **infra**, 74a, para. 22). There is nothing in the complaint or record to indicate anyone in the nominative and appointive process was aware of, or had investigated the information distributed by Mrs. Guercio. There is no evidence of any public scrutiny of nominee Woods' previous failed nomination. Such public scrutiny would be important to restoring public confidence. Thus, again, the majority opinion assumes facts not before the panel and relies on those facts improperly to choose inferences favorable to Judge Feikens.

4. Assumption of fact not in the record.

The majority improperly infers that the effort to restore integrity was "progressing expeditiously and effectively" (App., **infra**, 17a), despite the allegations that the nomination of Woods was controversial and criticized from the start, and despite the absence of any fact upon which to infer that nominee Woods' prior nomination difficulties had been investigated at all. A public airing of nominee Woods' previous difficulties was certainly appropriate to a corrupted court's efforts to restore itself, and nominee Woods' "bitter resentment" (App., **infra**,

20a) over a public airing, together with the already existing controversy and criticism of his nomination for other reasons, afford little basis for the majority opinion's assumptions that everything was fine until Mrs. Guercio distributed her information.

5. Misstatement of fact.

The majority opinion mischaracterizes Judge Feikens' ten-month refusal to do anything with Mrs. Guercio's corruption information as a mere withholding of "formal" action (App., **infra**, 16a): "Although both Judge Feikens and the Administrative Office of the United States Courts initially withheld formal action..." (**Id.**). There is nothing in the record indicating *any* action, formal or informal, and Mrs. Guercio indeed alleged, on information and belief, that Judge Feikens refused to consent to any action by the Administrative Office. The opinion thus erroneously robs Mrs. Guercio of the permissible inference that a judge, who does nothing with evidence of corruption for some ten months, until Mrs. Guercio has taken her proof to so many places that investigation and publicity were inevitable, might well be motivated by something other than the nonexistent "disruption" of operations improperly assumed by the court.

The court's repeated assumption of facts not in the record and repeated reliance on inferences not properly available on a motion to dismiss for failure to state a claim skews the majority opinion's conclusions as to what a reasonable judge would have done when faced with the threat of a nominee not to work with other judges unless his demands are met. This problem underlies the majority's entire attempt to balance the public interest in efficiency and integrity against Mrs. Guercio's rights to speak out on matters of grave concern.

The majority opinion, having no facts in the complaint to justify a reasonable judge acceding to a nominee's outrageous threat, has improperly assumed facts which would begin to tilt

the scale of reasonableness towards respondents. There are no facts concerning morale levels, about the seriousness of Woods' temper tantrum, about disruption having occurred, about the probabilities of "potential" disruption. In the absence of such facts, a *Pickering* balancing test, applied to the detailed allegations of an unanswered complaint, cannot raise the respondent judges' conduct to that of a reasonable federal judge.

CONCLUSION

Based on the foregoing, this Court should issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the final judgment by that court.

Respectfully submitted,

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December 1990

No. 88-2013/89-1137

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HELEN J. GUERCIO, Plaintiff-Appellee,	)	
v.	)	ORDER
GEORGE BRODY, Defendant-Appellant (88-2013), Defendant (89-1137),	)	
JOHN FEIKENS, Defendant (88-2013) Defendant-Appellant (89-1137)	)	

BEFORE: KRUPANSKY and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

88-2013/89-1137

HELEN J. GUERCIO,

Plaintiff-Appellant,
v.
GEORGE BRODY (88 2013),
JOHN FEIKENS (89-1137),
Defendants-Appellants.

Before: KRUPANSKY and WELLFORD, Circuit Judge; and CELEBREZZE, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same hereby reversed and the case is remanded for adjudication of Plaintiff's remaining equitable claims for relief.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Issued as Mandate: October 4, 1990 A True Copy.

(88-2013) (89-1137)

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

Nos. 88-2013/89-1137

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HELEN J. GUERCIO,
Plaintiff-Appellee,

v.

GEORGE BRODY (88-2013)
and JOHN FEIKENS (89-1137),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed August 13, 1990

Before: KRUPANSKY and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

KRUPANSKY, Circuit Judge, delivered the opinion of the court, in which CELEBREZZE, Senior Circuit Judge, joined. WELLFORD, Circuit Judge, (pp. 24-27) delivered a separate opinion concurring in part and dissenting in part.

KRUPANSKY, Circuit Judge. Defendants-appellants, George Brody (Brody) and John Feikens (Feikens) (collectively, appellants), appeal the denial of their motion to dismiss plaintiff-appellee Helen Guercio's (Guercio) complaint on the basis of qualified official immunity. The facts of this controversy were set out previously and the reader is referred

to the circuit's previous opinion for a full rendition. *Guercio v. Brody,* 814 F.2d 1115 (6th Cir. 1987) (*Guercio I*).

In summary, Guercio, who had been discharged from her position as confidential secretary to then Bankruptcy Judge Brody, commenced this action against him and District Judge Feikens, formerly Chief Judge of the United States District Court for the Eastern District of Michigan, for wrongful termination of her employment in alleged violation of her constitutional right to free speech. Guercio asserted a cause of action arising under *Bivens v. Six Unknown Agents,* 403 U.S. 388 (1971), and sought injunctive relief, declaratory relief, equitable relief, and monetary damages. Specifically, Guercio prayed in her second amended complaint for a declaration that her termination was unconstitutional, for an injunction ordering her reinstatement to the same or a similar position, for backpay and accrued benefits up to $9,999.00,[1] and for damages in the amount of $1 million from Feikens and Brody jointly and severally in their individual capacities.

This circuit's opinion in *Guercio I* related the following factual scenario:

> The facts of this case, as alleged in the complaint and affidavits of record, lead us through an unfortunate chapter in the history of the U.S. Bankruptcy Court for the Eastern District of Michigan — a period in which Ms. Guercio asserts that she played

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[1]The United States District Courts have jurisdiction over claims against the United States for monetary relief of less than $10,000 pursuant to the Little Tucker Act, 28 U.S.C. § 1346(a)(2). Appeals from such actions, however, lie only in the Federal Circuit. 28 U.S.C. § 1295(a)(2); *United States v. Hohri,* 482 U.S. 64 (1987). The Federal Circuit has determined that Guercio's second amended complaint *does not* state a claim under the Little Tucker Act. *Guercio v. Brody,* 884 F.2d 1372 (Fed. Cir. 1989). Therefore, this court, and not the Federal Circuit, has jurisdiction over this appeal.

a central role in exposing corruption in the Bankruptcy Court.

According to the allegations, Guercio was hired in January 1979 by Judge Brody to serve as his secretary. From October 1979 through June 1981, Guercio made various disclosures concerning corruption in the Bankruptcy Court. She revealed, for example, that the Bankruptcy Court's system of random case assignments was being manipulated. These disclosures eventually led to the resignation of a bankruptcy judge as well as the criminal convictions of an attorney and bankruptcy court clerk.

As part of this chain of events resulting from her disclosures, Guercio alleges that the Judicial Council of the Sixth Circuit intervened and placed the Bankruptcy Court in virtual receivership. The Judicial Council stated in an order dated May 6, 1981:

> The Council concludes that the effective and expeditious administration of the business of the courts within this circuit requires that the administration of the Bankruptcy Court for the Eastern District of Michigan be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision should include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court.

By an order of May 18, 1981, the judges of the U.S. District Court for the Eastern District of Michigan directed Chief Judge Feikens to assume supervisory responsibility for the Bankruptcy Court pursuant to

> the earlier order of the Judicial Council of the Sixth Circuit.

Guercio I, 814 F.2d at 1116.

The record further discloses that the resignation of one of the bankruptcy judges who had been affected by the disclosures of corruption compelled the nomination of a replacement, and that George Woods (Woods) was nomiated to fill the position. Subsequent to the announcement of the Woods nomination, but prior to his confirmation, Guercio amassed and circulated "to the press and others" newspaper articles that had originally appeared approximately eleven years earlier in connection with Woods's 1969 nomination for United States Attorney for the Eastern District. *Id.* The newspaper articles apparently discussed Woods's purported legal representation of reputed organized crime figures during an earlier stage of his career. According to the complaint, Woods took umbrage with Guercio's disclosures and threatened Brody with withholding his "cooperation" should he be confirmed as a bankruptcy judge. Brody, in turn, reported his dilemma to Chief Judge Feikens, who, allegedly, instructed Brody to discharge Guercio.

The district court originally granted both judges absolute immunity from suit, reasoning that the decision to discharge Guercio was undertaken in a judicial capacity. Another panel of this court reversed that determination in *Guercio I*, finding that Guercio's termination was in the nature of a ministerial or administrative act, as opposed to the type of judicial function traditionally accorded absolute immunity, *Guercio I*, 814 F.2d at 1119-20, and remanded the action to the district court, expressing no opinion as to the judges' entitlement to the protection of qualified immunity. *Id.* at 1120. Subsequently, the full court granted rehearing en banc to consider the question of absolute immunity insofar as it applied to Chief Judge Feikens. *Guercio v. Brody*, 823 F.2d 166 (6th Cir. 1987). Prior to rehearing en banc, however, the Supreme

Court announced its opinion in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538 (1988). In response to *Forrester*, this circuit vacated its order granting rehearing en banc, reinstated its previous mandate (rendered in *Guercio I*) relative to Judge Feikens, and remanded the entire matter to the district court in order to "consider the entire case in light of the Supreme Court's decision in *Forrester v. White* and consider the remaining issues in light of *Forrester v. White* and this court's reinstated decision of April 1, 1987." *Guercio v. Brody*, 859 F.2d 1232, 1233 (6th Cir. 1988).

While the language of this last mandate would seem to suggest that the district court on remand was to reevaluate the propriety of granting *absolute* immunity in light of *Forrester v. White*, it is difficult to reconcile that suggestion with the court's "reinstatement" of its first opinion in *Guercio I*, which unequivocally denied the availability of absolute immunity for the act in question. The panel's decision in *Guercio I* is the law of this case, and both judges were, accordingly, foreclosed from asserting absolute judicial immunity as a defense against Guercio's charges in future proceedings.[2]

The sole remaining question, then, is whether the district court erred on remand in denying the judge's motions for dismissal, which motions were premised on a defense of qualified immunity. Resolution of this issue hinges entirely upon an accurate and comprehensive analysis of the qualified immunity test as it has been pronounced and applied in the opinions of the Supreme Court and this court, and applica-

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[2]The possibility that this court desired the district court to reconsider the absolute immunity issue in light of *Forrester* is belied to a large degree by *Forrester*'s unequivocal holding that judges are not entitled to absolute immunity from suit for actions arising out of personnel decisions. *Forrester*, 484 U.S. at 229-30, 108 S.Ct. at 545-46. Thus, although the language of the court's mandate in *Guercio I* is unclear, further consideration of absolute immunity is foreclosed by the *Forrester* rationale.

tion of that test to the facts of the case at bar as they are portrayed in Guercio's second amended complaint.

In the seminal case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court declared that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Ad hoc application of the *Harlow* test in the context of the facts of this particular case requires, at the threshold, examination of Guercio's complaint for a precise understanding of what she alleged to have occurred in the course of events leading to her discharge. Her complaint pleads a single cause of action summarized in paragraphs 24 and 31 as follows:

> 24. Defendants Feikens and Brody were motivated to effect and did effect plaintiff's termination solely because of her participation in exposing corruption in the Bankruptcy Court and her distribution of the 1969 newspaper articles critical of the nominee who was being considered to replace the judge whose corruption had been exposed by plaintiff. At all times relevant herein, defendants were aware of plaintiff's participation in exposing corruption in the court and of her distribution of articles relevant to the Woods nomination.
>
> 31. By denying plaintiff her rights under the First Amendment to speak on matters of public concern, defendants Feikens and Brody deprived plaintiff of her rights and privileges secured by the Constitution . . . .

In sum, in her single cause of action Guercio recited a continuous course of conduct commenced in December of 1979, ultimately resulting in her discharge in October of 1981.

Guercio's activities as Judge Brody's secretary and as a disseminator of matters of ostensible public interest are best viewed on a continuum, starting with her initial employment in 1979, her disclosures about corruption in the bankruptcy court, and concluding with her circulation of the 1969 newspaper accounts as a commentary on Woods's fitness for the office to which he had been nominated.

The motion to dismiss invoking the doctrine of qualified immunity filed by Judge Feikens because his "conduct did not violate any right so clearly established that all reasonable [Judges] would know they were under an affirmative duty to refrain from such conduct" joins issues of law to be decided by the court exclusively upon the allegations incorporated into the complaint, which must, for purposes of considering the motion to dismiss, be accepted as true. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989). "The question of whether qualified immunity attaches to an official's actions is a purely legal question for the trial judge to determine prior to trial." *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988); *see also Ramirez v. Webb*, 835 F.2d 1153, 1156 (6th Cir. 1987); *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987); *Donta v. Hooper*, 774 F.2d 716, 719 (6th Cir. 1985), *cert. denied*, 483 U.S. 635 (1987).

Thus, the question confronting this court, simply stated, is not whether Judge Feikens actually violated Guercio's first amendment right of free speech — an issue of fact reserved for the jury — but, rather, is whether plaintiff's rights were so clearly established when she was terminated that Judge Feikens should have understood that his conduct at the time he ordered her discharge violated her first amendment right to free speech — a question of law to be decided by the court. *Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987); *Garvie v. Jackson*, 845 F.2d at 649; *Ramirez v. Webb*, 835 F.2d at 1156.

In the case at bar, the district court was, without question, correct in concluding that the right that Guercio alleged Feikens to have infringed was, *in the abstract*, clearly established in 1981 under the Supreme Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1967). The teachings of *Pickering* charted the course for a determination of Judge Feikens's entitlement to the shield of qualified immunity. In that decision, the Supreme Court instructed that a public employee's interest in commenting on matters of public concern is protected by the first amendment only insofar as it is of greater weight than the employer's interest in "promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. Under this familiar rule of balance, the employee's rights to free speech are qualified by the countervailing interests of his employer. When a *Pickering* claim is adjudicated on its merits, it is for the fact-finder, be it jury or court, to determine the relative weight of these potentially antithetical interests. In the qualified immunity context, by contrast, it is the responsibility of the court to determine if the law was so clearly established at the time of the incident that a reasonably competent public official should have known that a course of action would be inconsistent with a public employee's rights as defined in *Pickering*.

Accordingly, having in the first instance properly defined the "clearly established by law" inquiry, this court must, in disposing of a qualified immunity motion, place the totality of the well-pleaded, non-conclusory allegations of the complaint on the *Pickering* scale to balance a public employee's interest in commenting on matters of public concern against the employer's interest in "promoting the efficiency of the public services it performs through its employees," *id.*, at 568. Without concluding where that balance ultimately comes to rest — a decision reserved for the trier of fact — this court must dispose of the motion to dismiss on the basis of qualified immunity pursuant to the dictates of *Harlow*, *Malley*,

Anderson, Garvie, etc., by determining whether *Guercio's* rights under *Pickering*, as opposed to whether the general teachings of *Pickering*, were so clear at the time in question that reasonable minds could not differ on the constitutionality of her discharge.

Writing upon a clean slate, then, the predicate issue to be decided by this appeal is whether Guercio's first amendment rights to free speech were so evident from pre-existing law (*viz.*, *Pickering*) when she was ordered discharged by Judge Feikens that, measured objectively, he was under an affirmative duty to refrain from such conduct. *Harlow v. Fitzgerald*, 457 U.S. at 818; *Anderson v. Creighton*, 107 S.Ct. at 3038; *Ohio Civil Service Employees' Ass'n v. Seiter*, 858 F.2d 1171, 1173 (6th Cir. 1988). This approach is distinct from that followed by the district court, which mischaracterized the qualified immunity inquiry as one requiring it "to determine whether the allegations in the Plaintiff's complaint clearly violated established law at the time that the incidents took place." Similarly reflective of the erroneous approach to the issue was the court's remark that "the . . . *Pickering* balancing test . . . [was] clearly established law at the time of Ms. Guercio's firing." As hereinafter discussed, the inquiry as framed by the district court was so abstract that its consideration of the motion to dismiss failed to apply the qualified immunity test *to the facts and circumstances of this case*. In sum, the district court's approach failed to apply the *Harlow* test, which in the first instance required a determination of whether a clearly established right was alleged to have been violated, and, secondly, a determination of whether a reasonable public official should have known that the conduct at issue was undertaken in violation of that right. As a consequence of its misdirection, the district court erroneously decided the defendant's qualified immunity motion to dismiss without applying the test that had been mandated by the Supreme Court and this circuit in *Harlow v. Fitzgerald, supra*; *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson*

v. Creighton, supra; *Dominque v. Telb, supra*; *Ramirez v. Webb, supra*; and *Garvie v. Jackson, supra.*

Garvie v. Jackson (a *Pickering* case of striking similarity) clearly counsels the application of a fact-specific, as opposed to abstract, approach to qualified immunity questions:

> We should focus on whether, at the time defendants acted, the rights asserted were clearly established by decisions of the Supreme Court or the courts of this federal circuit. Cf. *Davis v. Scherer*, 468 U.S. [183] at 192, 104 S.Ct. [3012] at 3018 [(1984)]; *Davis v. Holly*, 835 F.2d 1175, 1182 (6th Cir. 1987). "[Defendants] have qualified immunity unless plaintiffs' 'rights were so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.' " *Ramirez v. Webb*, 835 F.2d at 1156 (quoting *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987)). It is not determinative that the plaintiff has asserted the violation of a broadly stated general right:
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> > [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: *The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.* This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent.
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> *Anderson*, 107 S.Ct. at 3039 (citation omitted) [emphasis added]; *see also Malley*, 475 U.S. at 341, 106

> S.Ct. at 1096 (if officers of reasonable competence could disagree on an issue, immunity should be recognized).
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> * * * * * *
>
> In arguing against defendants' claim of qualified immunity, Garvie asserts that a reasonably competent public official would have known in 1986 that an alleged retaliatory termination of a department head based on the exercise of first amendment rights was unlawful. *We believe that under the reasoning of Anderson, however, Garvie's argument presents too general a question. Instead, we consider whether reasonably competent officials could have disagreed on whether and to what extent Garvie's speech was protected by the first amendment.*

Garvie v. Jackson, 845 F.2d at 649-50 (emphasis added). *See also Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.) (en banc), *cert. denied*, 109 S.Ct. 497 (1988) (" 'the test for immunity should be whether the law was clear in relation to the specific facts confronting the public official when he acted' ") (quoting *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987)); *Green v. Carlson*, 826 F.2d 647, 649 (7th Cir. 1987) (district court framed too general a question in examining abstract existence of clearly established constitutional right without considering "the specific facts of this case").

The standard to be applied in resolving the "clearly established law" predicate within the *Harlow* touchstone of "objective legal reasonableness" is defined in *Malley v. Briggs* with clarity: "*if officers of reasonable competence could disagree on this issue, immunity should be recognized.*" 475 U.S. at 341 (emphasis added). The qualified immunity test thus is not as stringent as the district court's disposition would imply, affording as it does "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.*

In light of *Pickering*, and mindful of the appropriate qualified immunity test as defined in *Harlow*, this court must decide from the continuous course of Guercio's conduct between December, 1979 and October, 1981, when she was discharged as recited in the complaint, if judges of reasonable competence in the position of Judge Feikens at the time here in issue could have disagreed upon whether her right to exercise her first amendment right to free speech without being terminated from her employment was outweighed by the public interest in restoring morale, cooperation, dignity, public respect, and confidence to the United States Bankruptcy Court for the Eastern District of Michigan, a court which had been corroded by corruption and favoritism.

In considering, pursuant to the mandate of *Pickering*, Guercio's asserted first amendment rights to speak on matters of public interest without jeopardy to her employment against any disruption that may have been caused by her disclosures of corruption in the bankruptcy court and in her circulation of the dated news accounts critical of Woods, this court should recollect the interdependent working relationship that existed between the bankruptcy and district courts and the judges thereof during 1981 when plaintiff's discharge occurred. Prior to the 1984 amendments to the Bankruptcy Code, bankruptcy judges were appointed by district court judges, and they served in a capacity "adjunct" to the district court. *See Northern Pipeline Construction v. Marathon Pipe Line Co.*, 458 U.S. 50, 76-87 (1982). The relationship was substantially changed in 1984 when the appointment of bankruptcy judges became the prerogative of the various circuit courts. *See* 28 U.S.C. § 152. The 1984 revisions to the Bankruptcy Code, although perpetuating the bankruptcy courts as functional adjuncts to the district courts, clarified and elevated jurisdictional distinctions between the courts, leaving the bankruptcy courts and judges in a more insular position than they had occupied previously. *See* 28 U.S.C. § 157.

Mindful of this historical condition, which was common to bankruptcy courts throughout the United States, and also mindful of the more particularized circumstances arising out of Judge Feikens's specially delegated responsibility pursuant to the mandate of the Sixth Circuit Judicial Council to restore morale, cooperation, public confidence, and efficient operation in the bankruptcy court, it is apparent that the potential for internecine conflict in the court was palpable and, moreover, that Judge Feikens's desire to prevent such conflict was both genuine and compelling.[3] Concerns for inter-chamber harmony, cooperation, and collegiality between judges and court personnel — judicially noticed by this court — were in all probability central and indispensable to the efforts of Chief Judge Feikens to implement the Sixth Circuit's mandate.

It is within this factual backdrop that the allegations of Guercio's second amended complaint that are material to the resolution of defendants' motion to dismiss invoking the defense of qualified immunity must be considered. These pertinent assertions appear in paragraphs 8 through 17 and paragraph 27 of the complaint, wherein Guercio relates her activities in disclosing corruption within the bankruptcy court, and paragraphs 18 through 26, wherein she recounts her activities in circulating the dated news accounts critical of bankruptcy judge designee Woods.

Accepting as true the nonconclusory allegations incorporated in these relevant sections of her complaint, it appears that Guercio's initiative — launched in 1979 — became, over a period of time, productive in notifying the District Court for the Eastern District of Michigan of improprieties that

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[3]At the time of Guercio's discharge, Chief Judge Feikens had been implementing the special delegation of responsibility to restore morale, cooperation, public confidence, and efficient operation in the bankruptcy court for approximately five months.

implicated both unethical and criminal conduct within the Detroit Bankruptcy Court. Although both Judge Feikens and the Administrative Office of the United States Courts (AO) initially withheld formal action on Guercio's original submissions, it appears from her pleadings that during the ensuing eleven months, plaintiff developed additional substantive factual proof to support her disclosures of irregularity in the Detroit Bankruptcy Court, which in turn prompted Judge Feikens to request the AO to investigate the situation. The investigation, which Judge Feikens requested and endorsed, and in which he actively participated along with the plaintiff and other authorities within the limits of his office, ultimately resulted in the resignations of Bankruptcy Judge Harry Hackett, Chief Clerk of the Bankruptcy Court William Harper, and Deputy Clerk Kathy Bagoff sometime around June 24, 1981.

As detailed above, a concerned Judicial Council of the Sixth Circuit intervened and placed the Bankruptcy Court into virtual receivership by an order dated May 6, 1981, the oversight of which mandate was delegated to Judge Feikens on May 18, 1981. The mandate was directed primarily at rehabilitating the court, and expressly conferred upon Judge Feikens (as sub-delegatee) responsibility for approving "*all personnel actions affecting employees of the Bankruptcy Court.*" *Guercio I*, 814 F.2d at 1116 (quoting Judicial Council mandate) (emphasis added).

For approximately twenty months, as the Bankruptcy Court investigation proceeded, plaintiff was neither admonished for nor discouraged from pursuing her activities, and she continued secure and free from threat to her employment. Under the circumstances, during this critical phase of the investigation and up to the point at which Guercio circulated the dated news articles critical of Woods, judges of reasonable competence could not but have believed that Guercio's job security was protected by the first amendment as interpreted in *Pickering*. However, in reaching a final disposition of the

defendant's motion to dismiss, Guercio's disclosure of irregularities in the bankruptcy court must be considered *along* with her circulation of the dated newspaper articles — that is, along the entire continuum of her conduct over an extended period of time, encompassing the totality of her activities as alleged in her complaint.[4]

The more pertinent allegations of the second amended complaint that bear upon the balance between Guercio's right to exercise her first amendment rights and the public interest in restoring morale, cooperation, public respect and confidence to the Bankruptcy Court for the Eastern District of Michigan — which effort was, at least until July or August of 1981, from the pleaded facts, progressing expeditiously and effectively — are pleaded in the following paragraphs of the second amended complaint:

> 17. Shortly after Hackett resigned, a committee of federal district court judges nominated attorney George E. Woods to replace Hacke as a Bankruptcy Judge. A three-attorney screening committee of Michigan attorneys approved the judges' nomination of Woods. Woods' nomination generated much public controversy, was widely criticized and defended, and was the subject of extensive media coverage.
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> 19. In the summer of 1981, plaintiff discovered old newspaper articles describing the controversy over Woods'

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[4]This case does not implicate the rule pronounced by the Supreme Court in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). Under *Mt. Healthy*, an employee may not successfully challenge her discharge if one of two asserted reasons for the termination — one constitutional and the other not — would, standing alone, have been sufficient to bring about the employer's decision. This case does not present a "dual motive" situation; according to Guercio's complaint, she was fired in response to a continuing course of conduct, and not *solely* as a result of her bankruptcy court disclosures or *solely* as a result of her distribution of the old newspaper articles critical of Woods.

1969 nomination for U.S. Attorney and its subsequent withdrawal. Plaintiff informed defendant Brody about the newspaper articles she had discovered regarding Woods and that she intended to distribute the articles to, among others, the committee considering Woods for the Bankruptcy Court judgeship. . . .

20. Plaintiff sent copies of the 1969 newspaper articles she had discovered concerning nominee Woods to the FBI, the AO, the judges' nominating committee, the United States Attorney's Office, and various newspaper reporters.

21. Woods informed defendant Brody that, because plaintiff had distributed the 1969 newspaper articles, Woods would, if appointed, refuse to work with defendant Brody unless plaintiff's employment were terminated. Defendant Brody thereupon discussed with defendant Feikens the demand by Woods that plaintiff be fired.

23. Upon information and belief, Judge Feikens demanded that Judge Brody terminate plaintiff's employment in light of the above disclosures concerning Woods. On October 16, 1981, Judge Brody did terminate plaintiff's employment.

24. Defendants Feikens and Brody were motivated to effect and did effect plaintiff's termination solely because of her participation in exposing corruption in the Bankruptcy Court and her distribution of the 1969 newspaper articles critical of the nominee who was being considered to replace the judge whose corruption had been exposed by plaintiff. . . .

27. The disruption in the Bankruptcy Court workplace, if any, that may have resulted from plaintiff's disclosures regarding the manipulation of the random

> assignment system and other disclosures of illegal activity, was minor, and such disruption, if any, was in fact caused only by those associated with or sympathetic to the persons whose illegal activities plaintiff had participated in exposing.

The nonconclusory allegations of paragraphs 17 through 27 of the second amended complaint recite that the dated news accounts critical of Woods were circulated after a committee of federal district judges of the Eastern District of Michigan had nominated him to replace Hackett as a bankruptcy judge, after his background and qualifications had been investigated, and after his nomination had been endorsed by a screening committee of three Michigan attorneys. In sum, the nominative and appointive procedures, including the required investigations, had been exhausted to completion when Guercio released the dated news accounts, which had been of public record for approximately eleven years. The circulation was not accompanied by any newly discovered disclosures of concealed past or current misdeeds or wrongdoing relative to the substance of the circulated news accounts critical of Woods. Guercio did not attest to the truthfulness or accuracy of the circulated news accounts nor did she directly express an opinion as to the integrity, honesty, ability, or other qualifications of Woods to serve as a bankruptcy judge.

Mindful of the disruptive implications of the turmoil within the Detroit Division of the Bankruptcy Court together with the Sixth Circuit Judicial Council's delegated mandate to restore the public confidence and efficient operation of the court by, among other actions, expeditiously appointing a judge to the vacancy created by the resignation of Judge Hackett; of the disharmony precipitated by Guercio's distribution of dated news articles, which disharmony Guercio has conceded affected to some degree the operation of the Bankruptcy Court, at least among personnel sympathetic to those individuals whose activities she had exposed; and of the

incipient confrontation manifested by the bitter resentment Woods displayed when he advised Judge Brody that he would, if appointed, refuse to work with Brody unless Guercio's employment were terminated, a competent judge in the position of Judge Feikens could have reasonably:

1. questioned if the circulation of the dated news accounts constituted an expression of speech protected by the first amendment;

2. concluded that plaintiff's expressions and activities concerning Woods served to frustrate the implementation of the Sixth Circuit Judicial Council's delegated mandate to restore the public confidence in the Detroit Bankruptcy court because they discredited and embarrassed the appointive procedure and raised the genuine spectre of conflict between judges of the court;

3. concluded that Guercio's expression and activities had become a force counterproductive and disruptive to the ongoing effort to rehabilitate and revitalize the operation of the Detroit Bankruptcy Court;[5] and

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[5]Conclusions (2) and (3) were especially reasonable in light of Justice Powell's admonition that

> the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (quoted with approval in *Connick v. Myers*, 461 U.S. 138, 151 (1983)). As noted in *Connick*, it is a "common-sense realization that government offices could not function if every employment decision became a constitutional matter." 461 U.S. at 143.

4. concluded that Guercio was no longer speaking out on matters of public interest, but rather had begun to speak as an employee on matters primarily of personal concern.

In considering Guercio's recitation of her continuous course of conduct as incorporated into her complaint, but before proceeding to a final resolution of the qualified immunity motion to dismiss within the confines of her pleadings, this court emphasizes that its disposition is not anchored in any single doctrinal point heretofore discussed, which, standing alone, would enable the appellants to prevail. Rather, the decision is rooted in the cumulative effects of the points discussed, together with an informed assessment of the general state of the law, all in the context of an inquiry that necessarily focuses on the objective reasonableness of an official's act when viewed in light of all properly pleaded facts.

Accordingly, accepting as true the totality of Guercio's allegations reciting a course of continuous conduct and events for the period from December, 1979, through the summer of 1981, this court must balance on the *Pickering* scale — without deciding where the balance will ultimately come to rest (a question of fact reserved for the jury) — Guercio's right to freely express herself as a citizen upon matters of public interest against the Bankruptcy Court's interest, as effectuated through Judge Feikens, in promoting the efficiency of the public services it performs through its employees. *See Pickering*, 391 U.S. at 568.

Malley and its progeny, including *Garvie*, *Dominque*, and *Ramirez* in this circuit, mandate that if judges of reasonable competence in the position of Judge Feikens at the time of Guercio's termination, measured objectively, could have disagreed as to where the *Pickering* balance would ultimately come to rest, the protection of qualified immunity should be granted. In this court's considered opinion, accepting the totality of plaintiff's well-pleaded allegations as true, judges

of reasonable competence in the position of Judge Feikens at the time here in controversy, measured objectively, could have disagreed as to:

1. whether and to what extent Guercio's speech was on a matter of public concern, entitling her to claim the protection of the first amendment; and

2. where the *Pickering* scale, with all of the parties' competing interests in the balance, would ultimately come to rest.

Consequently, for the reasons herein, it is the court's judgment that Guercio's right to protection under the first amendment was not so clearly established at the time that Feikens ordered her termination that any judge of reasonable competence in the position of Judge Feikens, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.

For these reasons, both Judge Feikins and Judge Brody[6] are entitled to the protection of qualified immunity. The district court's dispositions are therefore reversed and the cases are remanded with instructions to vacate the judgments below and dismiss the plaintiff's causes of action insofar as they seek the recovery of monetary damages from Brody and Feikens in their individual capacities.[7] Existing precedent

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[6]The qualified immunity question must be approached from the perspective of Judge Feikens, only, because it is clearly alleged that Brody terminated Guercio only upon direction from Feikens, and not for independent reasons or on his own initiative. Having concluded that Feikens is entitled to immunity, then Brody, too, benefits from that determination.

[7]A court may properly dispose of a case for reasons of qualified immunity on a motion to dismiss on the pleadings, without discovery or the filing of a motion for summary judgment. "[A] defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). A

within this circuit, however, dictates that the defense of qualified immunity protects officials only from suit for *monetary damages*. *Hensley v. Wilson*, 850 F.2d 269, 273 (6th Cir. 1988); *Littlejohn v. Rose*, 768 F.2d 765, 772 (6th Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986). "An official is not entitled to immunity from actions seeking only injunctive or declaratory relief." *Spruytte v. Walters*, 753 F.2d 498, 510 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

In light of the policy underlying the doctrine of qualified immunity, it is worth noting that the rule excepting equitable claims from a defense of a qualified immunity assumes dubious validity if applied without particularized concern for individual cases. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Supreme Court noted that "the 'consequences' with which [it was] concerned in *Harlow are not limited to liability for money damages* . . . ." *Id.* at 526 (emphasis added). Rather, in formulating the qualified immunity doctrine, the Court was primarily concerned with preventing the distraction of public officials from the performance of their discretionary governmental duties by shielding them " 'from the risks of *trial* . . . .' " *Id.* (quoting *Harlow*, 457 U.S. at 816) (emphasis added). The Sixth Circuit's rule excepting equitable claims from the defense of qualified immunity is predicated on the notion that "actions against parties in their official capacities are, essentially, actions against the entities for which the officers are agents." *Littlejohn v. Rose*, 768 F.2d at 772. Insofar

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"defendant could properly challenge the sufficiency of the complaint under F.R.C.P. 12(b)(6) on the basis that he was entitled to qualified immunity *because the facts pleaded* would not show that his conduct violated clearly established law of which a reasonable person would have known at the time." *Dominque v. Telb*, 831 F.2d at 677 (emphasis added). *See Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986) (failure to plead violation of a clearly established right of which a reasonable official would have known "precludes plaintiff from proceeding further, even from engaging in discovery . . . .").

as this approach to equitable claims does not place public officials at the peril of defending actions for which they have been held immune from personal liability, there is no genuine conflict with the quoted language from *Mitchell v. Forsyth.*

It is difficult, however, to discern precisely which governmental "entity" will assume the burden of defending against Guercio's equitable claims on remand.[8] Thus, in this case it is by no means clear that dismissal of all but the equitable claims will fully serve the purpose for which qualified immunity is granted under *Harlow.* The cited Sixth Circuit cases reflect no limiting principle with respect to when it is (or is not) appropriate to exclude equitable claims from the coverage of an otherwise valid defense of qualified immunity, and this panel must accept and apply the dictates of this circuit's enunciated precedents. For this reason, Guercio's remaining equitable claims asserted against the appropriate governmental entity — the request for a declaratory judgment, for a mandatory injunction ordering Guercio's reinstatement to the same or a similar position to which she held at the time of her discharge, and for backpay and benefits up to $9,999.00[9] — must be remanded to the district court for additional consideration, notwithstanding appellants' entitlement to qualified immunity from the claim for money dam-

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[8]As noted by the Federal Circuit in its disposition of the Little Tucker Act jurisdictional question, *see supra* note 1, Guercio was "an employee of the court to which she was appointed" and not of any discernible governmental agency. *Guercio v. Brody,* 884 F.2d at 1374.

[9]As explained *supra* at note 1, Guercio limited her claim for backpay and benefits to $9,999.00 so as to preserve the jurisdiction of the district court over what she presumed to be a claim brought under the Little Tucker Act. In concluding that Guercio had *not* stated a claim under the Little Tucker Act, the Federal Circuit was unable to discover any "statutory or regulatory authority that it might entitle a person in Guercio's position to an award of back pay . . . ." *Guercio v. Brody,* 884 F.2d at 1374. Therefore, among Guercio's burdens on remand will be to prove the existence of a valid cause of action for backpay.

ages. This court further notes, however, that it appears unlikely that Guercio may recover all of the equitable relief that she requests in her complaint. Specifically, the authority of the district court to order Guercio reinstated to "her former position or an equivalent position" is subject to question. First, this court takes notice of the fact that Bankruptcy Judge Brody has retired from the court, and consequently Guercio's secretarial position no longer exists. Second, the availability of "equivalent positions" is debatable and this court doubts that a judge of the bankruptcy court may be ordered to employ a confidential secretary not of his or her personal selection.

Accordingly, the judgment of the district court denying appellants' motion to dismiss is **REVERSED** and the case is **REMANDED** to the district court for adjudication of Guercio's remaining equitable claims for relief.

WELLFORD, Circuit Judge, concurring in part and dissenting in part:

I am most reluctant to dissent from the thoughtful opinion in this very difficult case. Had a motion for summary judgment been filed in this case by defendants rather than a motion to dismiss, I am persuaded that application of the balancing test under *Pickering v. Board of Education*, 391 U.S. 563 (1967), would have presented a less complex problem to solve.

Persons standing in the position of defendants, asserting qualified or good faith immunity, could reasonably view plaintiff's actions as bringing about disharmony, recrimination, and continued turmoil in that court, which was in virtual receivership, with Judge Feikens named as an effectual receiver. 28 U.S.C. § 332(d)(2), dealing with the formation and operation of circuit judicial councils, directs that "[a]ll judicial officers and employees of the circuit shall promptly carry into effect all orders of the circuit council." Judge Feikens was placed with ultimate "supervisory responsibility and oversight" and directed to restore that court's harmonious, efficient and effective operations. *See Guercio I.*

Pickering stands for the essential proposition that a public employee (in that case a public school teacher) could not be compelled by threat of discharge to relinquish first amendment rights of public criticism of the public employer (the school board). At the same time, the Supreme Court recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568. The Court proceeded to state the problem in such a case: "to arrive at a balance between the interests of the teacher . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs . . . ." *Id.* at 568. Because Pickering's general public criticism of policies was "*in no way*

directed towards any person with whom appellant [Pickering] would *normally be in contact* in the course of his daily work as a teacher," there was therefore "no question of maintaining either discipline by immediate superiors or *harmony among coworkers*. . . ." *Id.* at 569-70 (emphasis added). While *Pickering* would cause defendants to be aware that plaintiff retained her first amendment right to criticize publicly the general policies of her employer, they were obviously aware that the conduct in question was directed toward Woods, who was to be a vital cog in the bankruptcy court operation, and her conduct in circulating old newspaper articles critical of Woods threatened the harmonious and effective relations necessary to bring about the expeditious administration of business and justice in the bankruptcy court.

The problem here which I cannot escape, and the reason for my dissent in part, is that the motion to dismiss requires us to take as true conclusory allegations in the amended complaint that may be inconsistent with other factual predicates in the complaint and with the historical record of what actually happened in the bankruptcy court based on Guercio's whistleblowing and responses of others who brought about the resignations of a bankruptcy judge, the clerk, and a deputy clerk. Guercio says in her complaint that she instituted charges about corruption over a twenty-month period, and no action whatever was taken to threaten her position as confidential secretary during all this time. It would seem that only after her later distribution of old newspaper accounts about Woods and the latter's reaction was there any motivation or purpose to bring about her termination. She concedes that Judge Feikens gave approval for a thorough investigation a year before her discharge, knowing of her role as a whistleblower. Yet plaintiff asserts (paragraph 24) that "*solely* because of her participation in exposing corruption in the Bankruptcy Court *and* her distribution of the 1969 articles," she was discharged (emphasis added).

If we were considering the issue based on a motion for summary judgment, a balancing of the important public interests of preserving harmony and avoiding discord in a shattered court against an employee's first amendment right to distribute stale information directed towards an important figure on that court might well result in a finding for defendants based on qualified immunity and on the *Pickering* balancing test. We cannot, however, properly take that step, despite my colleague's persuasive analysis in the majority opinion, because we are dealing with a Rule 12(b)(6) motion. I recognize, of course, that a summary judgment motion would engender proof beyond the complaint and I make no prejudgment with respect to the ultimate ruling on a summary judgment motion based on qualified immunity.

Regretfully, I cannot agree with two propositions in the majority's analysis:

> (1) "a competent judge in the position of Judge Feikens could have reasonably questioned if the circulation of the dated news accounts constituted an expression of speech protected by the first amendment," and
>
> (2) defendants could reasonably have concluded that "Guercio was no longer speaking out on matters of public interest, but rather . . . on matters primarily of personal concern."

Connick v. Myers, 461 U.S. 138 (1982), gives us guidance in this latter regard, but the content and nature of Guercio's expressions differ materially from those of Myers, who was found to be looking out to preserve her own personal interests rather than to engage in discussion of matters of public interest. *Connick* puts the matter in proper perspective:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental.

> This language, reiterated in all of *Pickering*'s progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government officers could not function if every employment decision became a constitutional matter.

Connick v. Myers, 461 U.S. at 143 (footnotes omitted).

I am in agreement with the majority analysis concerning the procedural posture and background of this controversy. I also concur in the conclusion concerning the remand to the district court with respect to the equitable claims made by Guercio.

I dissent on the reversal of the district court order on the damages aspect of plaintiff's complaint.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HELEN GUERCIO,

Plaintiff

v. Civil Action No. 84-CV-74736-DT

GEORGE BRODY, et al, HON. JULIAN ABELE COOK, JR.

Defendants

_____/

ORDER

On September 1, 1988, the Defendant, John Feikens,1 filed a motion, contending that he is entitled to an order of dismissal on the basis of an absolute judicial immunity defense or, in the alternative, the protections of qualified immunity.2 For reasons that have been set forth below, this Court must deny his motion.

I

In July 1985, this Court granted Judge Feikens' original motion to dismiss, after concluding that he was entitled to an absolute immunity defense as a judicial officer. On April 1, 1987, the Sixth Circuit Court of Appeals reversed.3 Nearly three months later (July 17, 1987), an en banc rehearing on the absolute immunity issued was ordered by that Court.4 However, on March 2, 1988, the appellate court vacated the July 17th directive, reinstated its April 1st order, and remanded the case to this Court for further proceedings.5

II

In Forrester v. White, 56 U.S.L.W. 4067 (U.S. Jan. 12, 1988) (No. 86-761), the Supreme Court was asked to determine whether a state court judge had absolute immunity from a 42 U.S.C. S 1983 claim for damages which arose from his decisions to demote and subsequently dismiss a probation officer. The plaintiff, who alleged that she had been demoted and terminated because of her sex, was awarded $81,818.80 in compensatory damages by a jury. However, the federal district court judge, before whom the trial was conducted, set aside the verdict and granted a summary judgment in favor of the defendant on the basis of his absolute judicial immunity defense. A divided panel of the Seventh Circuit Court of Appeals affirmed.6

The Supreme Court reversed, reaffirmed the "functional approach" to immunity questions,7 and concluded that the state judge had acted in an administrative capacity - not as a judicial officer - when he discharged Cynthia Forrester.

Justice O'Connor, writing on behalf of her colleagues,8 opined that the difficulty in resolving judicial immunity issues was "draw[ing] the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges."9 Thereafter, she concluded that "immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches."10

The Forrester Court also found that while personnel decisions "may have been quite important in providing the necessary conditions of a sound adjudicative system[,] [t]he decisions . . . were not themselves judicial or adjudicative,"11 reasoning that "a judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or . . . from any other executive branch official who is responsible for making

such employment decisions."12 Judge White had argued that he was the only person in his court with authority to hire or fire probation officers under Illinois law. However, the Supreme Court found this position to be unpersuasive, stating "that because a judge acts within the scope of his authority, [and, thereby, conclude that] such employment decisions are converted into 'judicial acts,' would lift form above substance."13

III

In the instant motion, Judge Feikens contends that he had acted pursuant to a directive from the Judicial Council.14 It is his belief that the authority, which had been conferred upon him by the Judicial Council, could only have been performed by a judge. On the basis of the Forrester rationale, this argument would appear to lift, or attempt to lift, form above substance.

The "function" involved in this case was a personnel decision. Like the judge in Forrester who was the only person authorized by statute to make personnel decisions, Judge Feikens had specific authority from the Judicial Council to undertake those measures that would be necessary in order to rid the Bankruptcy Court of its scandal. However, this directive did not modify or alter the nature of the decision to terminate the employment of the Plaintiff, Helen Guercio, from an administrative determination to a judicial act. To hold otherwise would run directly counter to the "functional approach" to judicial immunity under the Forrester standard.

Therefore, this Court concludes that the teaching of Forrester v. White requires a finding that Judge Feikens is not entitled to the protection of an absolute judicial immunity defense with regard to his role in the termination of Ms. Guercio's employment with the Bankruptcy Court.15

IV

This Court now turns to Judge Feikens' contention that his approval of Judge Brody's decision to discharge Ms. Guercio is protected by the doctrine of qualified immunity.16 The doctrine of qualified immunity was articulated in Harlow v. Fizgerald, in which the Supreme Court stated that:

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.17

The purpose of providing qualified immunity protection to public servants is to insulate them from meritless lawsuits, which, in turn, would prevent the expenditure of unnecessary social costs by the Government, including:

> the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.18

In order to achieve this stated purpose, the Supreme Court made it clear that the protection of qualified immunity is not merely an affirmative defense to liability on the merits. Rather, it is "an entitlement not to stand trial or face the other burdens of litigation, . . . [which is] . . . conditioned on the resolution of the essentially legal question whether the conduct of which the Plaintiff complains violated clearly established law."19 Thus, the application of the Harlow standard during the litigation stage of a proceeding has been viewed by one court as being extremely important in those situations in which:

> plaintiffs might allege facts demonstrating that defendants had acted lawfully, append a claim that they did so with an unconstitutional motive, [i.e., creating a question of fact] . . . and as a

> consequence usher defendants into discovery, and perhaps trial . . . [which is] ... precisely the burden Harlow sought to prevent.20

A discussion of how Harlow should be applied, especially in the context of a dispositive motion, is contained in Kennedy v. City of Cleveland, in which the Court stated:

> A defendant may initially raise immunity as a bar to litigation in a motion to dismiss. Where a defendant official is entitled to qualified immunity the plaintiff must plead facts which, if true, describe a violation of a clearly established statutory or constitutional right of which a reasonable public official, under an objective standard, would have known. The failure to so plead precludes a plaintiff from proceeding further, even from engaging in discovery, since the plaintiff has failed to allege acts that are outside the scope of the defendant's immunity.21

In Dominque v. Telb, the Court of Appeals for the Sixth Circuit vacated the denial of a motion by the defendant, who had sought dismissal on the basis of a qualified immunity defense, because the trial court erroneously "placed upon the defendant the entire burden to justify his entitlement to qualified immunity."22 The Court explained that the plaintiff:

> should normally include in the original complaint all of the factual allegations necessary to sustain a conclusion that defendant violated clearly established law.23

In determining that it was not the burden of the defendant to prove that its conduct did not violate clearly established law, the Dominque Court opined:

> Even though qualified immunity is an affirmative defense, the district court should not require the defendant to prove, upon penalty of denial of his motion, that the conduct plaintiff alleged did not violate clearly established law . . . .

Rather, . . . the district court must decide the purely legal question of whether the law at the time of the alleged action was clearly established in favor of the plaintiff.24

We now turn to the question of whether the firing of Ms. Guercio by Judge Feikens violated "clearly established law" as it existed in October 1981.25 This Court must determine whether "the contours of the right that the government official allegedly violated was [sic] sufficiently clear that a reasonable official would have understood that what he was doing violates that right."26 In 1987, the Supreme Court offered some guidance for these determinations by stating:

> this is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of preexisting law the unlawfulness must be apparent.27

The seminal case concerning public employment and an employee's right to speak on matters of public concern is Pickering v. Board of Education.28 In Pickering, the Supreme Court held the dismissal of a high school teacher for openly criticizing the Board of Education about its allocation of school funds was impermissible under the First Amendment. The Court explained:

The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public service it performs through its employees.29

This constitutional right, like many others, involves a balancing test which contains factors that were subsequently analyzed and summarized by the Sixth Circuit Court of Appeals:

Relevant factors justifying a state's regulation of

> its employees' speech include the content of the speech, coworker harmony, maintaining discipline by immediate supervisors, need for personal loyalty and confidence between workers and supervisors . . . and the time, place and manner in which the speech is delivered.30

All of these factors, as well as the underlying Pickering balancing test, were clearly established law at the time of Ms. Guercio's firing. Ms. Guercio asserts that she was terminated as Judge Brody's legal secretary because of her (l) contribution to the investigation of the corruption within the Bankruptcy Court which resulted in the resignation of another Bankruptcy Judge and the convictions of the Bankruptcy Clerk and a highly successful bankruptcy attorney, and (2) disclosures concerning then nominee George Woods.3l Prior to her involuntary departure from the Bankruptcy Court, Ms. Guercio transmitted newspaper articles about the the nominee's alleged "contacts with organized crime" to the Federal Bureau of Investigation, the nominating committee, the United States Attorney's Office, among others.32 She also asserts that nominee George Woods, reacting to these communications, informed Judge Brody that he, if appointed, would not work with him unless Ms. Guercio's employment with the Bankruptcy Court was terminated.33 Ms. Guercio believes that Judge Feikens learned of the demand and, thereafter, ordered her to be fired.34

Judge Feikens contends that, on the basis of his responsibility to restore integrity to the scandal-ridden Bankruptcy court, it was reasonable for him to conclude that his involvement with regard to Ms. Guercio's termination of employment from the Bankruptcy Court was lawful.

Judge Feikens also submits that he is entitled to the protections of qualified immunity because all of his activities involving Ms. Guercio were conducted pursuant to a directive from the Judicial Council of the Sixth Circuit which required him to supervise the Bankruptcy Court. He asserts that this directive "conveyed an authority to him comparable to the

authority inherent in his more accustomed judicial acts" with respect to personnel decisions in the Bankruptcy Court.35 Judge Feikens maintains that a chief district court judge, who acts "pursuant to a judicial council order under Sec. 332(d)(1), still has every reason to believe that the authority delegated thereby is judicial in nature."36

The content of Ms. Guercio's oral and written expressions are undeniably protected speech concerning a public issue. The Court of Appeals for the Sixth Circuit has determined that "[p]ublic interest is near its zenith when ensuring that public organizations are being operated in accordance with the law."37 Ms. Guercio's criticism in this case were directed to the illegal and unethical practices within the Bankruptcy Court - not to the conduct of her immediate supervisor. Therefore, it cannot be said that Ms. Guercio imperiled or threatened the loyalty and/or responsibility to her immediate supervisor, Judge Brody.

In Pickering v. Board of Education, supra, the Court noted:

> The [critical] statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. . . Appellant's employment relationships with the Board . . . are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.38

In this case, Ms. Guercio worked for Judge Brody on a daily basis - not the whole Bankruptcy Court or Judge Woods - about whom she was arguably critical. Judge Feikens was under a duty to consider all of the relevant factors when he authorized the employment termination of Ms. Guercio. The speech in question in this case was ostensibly made in the context of some very troubling allegations concerning corruption in the Bankruptcy Court many of which were sadly proven to be true.

Public policy strongly supports and encourages such speech.39

This Court concludes that the movant in this instance should have known that the termination of an employee for conducting those activities which have been outlined on this record would strike at the core of Ms. Guercio's First Amendment protections and violate clearly established law, as articulated in Pickering thirteen years earlier.

Finally, it has been alleged that Ms. Guercio cannot defeat Judge Feikens' qualified immunity claim because her Complaint pleads "retaliatory" intent in a conclusory manner. In the context of qualified immunity, whenever a complaint involves a "claim that defendants acted with an unconstitutional motive, [this court] will require that nonconclusory allegations of evidence of such intent must be present in a complaint."40 Contrary to the movant's assertion, this Court does not find the Complaint to contain merely conclusory allegations. Ms. Guercio has clearly alleged the events and circumstances, as she perceived them, with sufficient particularity to satisfy the pleading requirements of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

/s/ Julian Abele Cook, Jr.
JULIAN ABELE COOKE, JR.
United States District Judge

Dated: Jan 5 1989
Detroit, Michigan

FOOTNOTES

1/ Defendant, John Feikens, served as the Chief Judge of the United States District Court for the Eastern District of Michigan from October 4, 1979 until March 1, 1986. He assumed senior status on March 1, 1986.

2/ An oral hearing was conducted on October 14, 1988.

3/ Guercio v. Brody, 814 F.2d 1115 (6th Cir. 1987).

4/ Id., 823 F.2d 166 (6th Cir. 1987).

5/ Id., 840 F.2d 358 (6th Cir. 1988); 859 F.2d 1232 (6th Cir. 1988).

6/ Forrester v. White, 792 F.2d 647 (7th Cir. 1986).

7/ Forrester v. White, 56 U.S.L.W. at 4068.

8/ Justice O'Connor delivered the opinion of the Court in which the remaining members joined in all of the opinion except Part II of which Justice Blackmun joined.

9/ Forrester v. White, 56 U.S.L.W. at 4069.

10/ Id. [emphasis in original].

11/ Id., at 4070.

12/ Id.

13/ Id.

14/ The Judicial Council stated in an order dated May 6, 1981:

> The Council concludes that the effective

and expeditious administration of the business of the courts within this circuit requires that the administration of the Bankruptcy Court for the Eastern District of Michigan be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision should include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court.

By an order of May 18, 1981, the judges of the U.S. District Court for the Eastern District of Michigan directed Chief Judge Feikens to assume supervisory responsibility for the Bankruptcy Court pursuant to the earlier order of the Judicial Council of the Sixth Circuit.

Guercio v. Brody, 814 F.2d 1115, 1116 (6th Cir. 1987).

15/ Arguably, the issue of Judge Feikens' claim to absolute judicial immunity has been resolved without the necessity of a Forrester evaluation, as outlined above. The recently reinstated April 1, 1987 order held that the firing of Ms. Guercio was not protected by the doctrine of absolute immunity. Thus, on the basis of the current record, this Court accepts the April 1st decision as the law of the case.

16/ Defendant, George Brody, sat as a Bankruptcy Judge from 1960 to 1988. He submitted the same legal argument to this Court as in the instant motion. He has appealed the rejection of his motion to the Sixth Circuit Court of Appeals. Although this Court had considered the

imposition of a stay of Judge Feikens' current motion until the appeal of Judge Brody had been finally resolved, the interest of justice and administrative efficiency mandates a more immediate decision.

17/ Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

18/ Id., at 814.

19/ Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

20/ Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984).

21/ Kennedy v. City of Cleveland, 797 F.2d 297, 299 (6th Cir. 1986).

22/ Dominque v. Telb, 831 F.2d 673, 676 (6th Cir. 1987).

23/ Id.

24/ Id.

25/ The general principle that "the district court must consider all the undisputed evidence. . . read in the light most favorable to the nonmoving party" is not affected by the examination of the qualified immunity issue by this Court. Poe v. Haydon, No. 87-5377, Slip op. at 12 (6th Cir. July 28, 1988).

26/ Poe v. Haydon, No. 87-5377, Slip Op. at 12 (6th Cir. July 28, 1988), citing Anderson v. Creighton, ___ U.S. ___ , 107 S. Ct. 3034, 3039 (1988).

27/ Anderson v. Creighton, 55 U.S.L.W. 5092, 5093 (U.S. June 25, 1987).

28/ 391 U.S. 563 (1968).

29/ Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

30/ Columbus Education Association v. Columbus City School District, 623 F.2d 1155, 1160 (6th Cir. 1980) [citations omitted].

31/ Judge George Woods served as a Bankruptcy Judge in the Eastern District of Michigan from 1981 until 1983 when he was elevated to the United States District Court for the Eastern District of Michigan. He currently sits as a member of that bench.

32/ Second Amended Complaint, paras. 18, 19, 20.

33/ Id., para. 21.

34/ Id., paras. 23-24.

35/ See Defendant's Brief at 12.

36/ Id.

37/ Marhonic v. Walker, 800 F.2d 613, 616 (6th Cir. 1987).

38/ Pickering v. Board of Education, 391 U.S. 563, 570 (1968).

39/ Marhonic v. Walker, 800 F.2d 613, 616 (6th Cir. 1987).

40/ Hobson v Wilson, 737 F.2d 1, 29-30 (D.C. Cir. 1984); see also, Guiterrez v. Municipal Court of the Southeast Judicial District, 838 F.2d 1031, 1051 (9th Cir. 1988); Poe v. Haydon, supra, at 25.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 84-CV-4736 DT

HELEN GUERCIO, PLAINTIFF

v.

GEORGE BRODY AND JOHN FEIKENS, DEFENDANTS

[FILED Aug. 28, 1985]

JUDGE'S DECISION ON MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Proceedings held in the above-entitled matter, before the HONORABLE JULIAN ABELE COOK, JR., U.S. District Judge, at 237 U.S. Courthouse and Federal Building, Detroit, Michigan, on Wednesday, July 10, 1985.

APPEARANCES:

CONSTATINE NICHOLAS REVELOS, ESQ.
MARYA C. YOUNG, ESQ.

Appearing on behalf of Plaintiff.

KEITH FISCHLER, ESQ.
Assistant United States Attorney

Appearing on behalf of Defendants.

* * *

DENISE A. MOSBY, CSR-RPR
Federal Official Court Reporter

Detroit, Michigan
Wednesday, July 10, 1985
Afternoon session

— — —

THE COURT: Thank you.

On October 15, 1984, the Plaintiff Helen Jean Guercio filed a complaint for damages and injunctive and declaratory relief with this Court against Defendants George Brody and John Feikens.

On January 2, 1985 this Court, having reviewed the Plaintiff's complaint, sua sponte dismissed the complaint to the extent, quote, that it makes allegations against Brody's and Feiken's judicial acts, end of quote.

Pursuant to a directive from the Court, the Plaintiff filed an Amended Complaint against the Defendants, in which she set forth a claim against the Defendants in their official and personal capacities.

The Plaintiff Helen Jean Guercio was, prior to the commencement of the original Complaint, a secretary to the Defendant George Brody, who was and is a Judge of the Bankruptcy Court within this district. At some point in time her responsibilities as the secretary to Judge Brody were terminated because, she alleges, Judge Brody had cited her conduct in criticizing a then prospective member of the Bankruptcy Court. The Plaintiff contends that she was fired from her job in contravention of her 5th Amendment right not to be deprived of any property interests which she acquired by virtue of her employment. She also claims that the termination of her responsibilities as Judge Brody's secretary constituted a deprivation of her 1st Amendment rights.

The plaintiff has also made a claim against the Defendant John Feikens, who, at all times that are relevant to these proceedings, was the Chief Judge of the United States District Court for the Eastern District of Michigan and served at times that preceded the commencement of this litigation as the receiver of the Bankruptcy Court.

Subsequent to the filing of the Amended Complaint, the Defendants filed a Motion to Dismiss Complaint or, in the Alternative, for Summary Judgment, citing Federal Rules of Civil Procedure 12(b)(6) and 56, respectively.

The Defendants claim that, one, they are entitled to absolute judicial immunity; two, that if absolute immunity is not appropriate, then they are entitled to be protected by a qualified immunity; and, third, that the Plaintiff has failed to state a cause of action. In so doing, the Defendants argue, one, that her 5th Amendment claim is without merit because she has no property right in her employment. The Defendants also argue that the Plaintiff has failed to establish or to allege that she has sustained any actual injury to her reputation, contending that nothing that was allegedly made public has demonstrated that she was damaged in any way.

The Defendants also argue that when applying the so-called PICKERING test, which originates from the case of PICKERING V. BOARD OF EDUCATION, 391 U.S. 563, that the balancing test limits the 1st Amendment rights of public employees. The Defendants assert that under the PICKERING test, that the balancing test would flow toward them; and, thus, there is no basis for her claim under PICKERING.

The Plaintiff, in response, takes issue with each of the positions which have been advanced by the Defendants and contends that none of the arguments which have been presented to the Court by the Defendants have merit. More specifically, the Plaintiff argues that neither Judge Brody nor Judge Feikens is entitled to an absolute judicial

immunity. The Plaintiff argues that the absolute judicial immunity doctrine is limited only to those acts which are of a judicial nature. The Plaintiff contends that this immunity applies only to legal decisions, since those decisions, if erroneous, can be corrected on appeal.

The Plaintiff also contends that the Defendants are in error when they contend that they are entitled to qualified immunity. The Plaintiff contends that there remain many genuine issues of material fact which, under the standards of summary judgment, should defeat their motion for dismissal and/or for summary judgment.

The Plaintiff has also attacked the PICKERING test and indicates that to adopt the standard which the Government has advanced to this Court would give to any judicial officer the right to summarily dismiss an employee.

And, finally, the Plaintiff argues that there are, as noted earlier, that there are many genuine issues which should be presented to a trier of fact for resolution.

The Court has examined the briefs which have been filed by the parties in this case. The Court has examined all of the positions which have been advanced by the parties in support of and in opposition to the positions which have been presented.

For the reasons which will be noted by the Court, the Court believes that the Government's motion for dismissal on the basis of absolute immunity should be granted. The Court believes that the remaining issues—namely, qualified immunity and failure to set forth a claim—need not be addressed in view of the ruling of the Court.

The Court believes that the case of STUMP v. SPARKMAN, 435 U.S. 349, a 1978 case which holds that absolute immunity for judges is applicable to all actions in which the Judge—that the Judge assumes. We believe that an examination of the applicable case law—and, parenthetically, there are no cases which have been pre-

sented to the Court which are truly applicable here, because the factual situation in the instant cause is different from any of the cases which have been cited—this Court believes that the interpretation of the judicial responsibilities which has been presented to the Court by the Plaintiff is far too narrow.

In the case of Judge Feikens, who had the responsibility of serving as the Chief Judge of the United States District Court, as well as the receiver for the Bankruptcy Court, there were responsibilities that he was required to and empowered to undertake in those capacities. To place a judicial officer in the position which has been advanced by the Plaintiff would, in the judgment of this Court, run contra to the spirit as well as the language of the cases which touch upon the issue of absolute judicial immunity.

While the Court recognizes that the actions of Judge Feikens and Judge Brody were not actions that were taken in the courtroom under the normal advocacy proceedings, that we believe that the actions of the Judges, whether correct or not, were done within their capacity as Judge of the United States District Court and Judge of the United States Bankruptcy Court for this district. We believe that the doctrine of absolue immunity is applicable here; and, thus, the Court will grant, as noted earlier, the request for dismissal by the Government.

As noted earlier, the issues which have been addressed by the parties on the other issues need not be advanced. The Court believes that, notwithstanding the argument of the Plaintiff that an adoption of the absolute immunity doctrine would not eliminate the case, this Court differs and believes that under the ruling of this Court, it represents a final order that the Motion to Dismiss is granted.

I would ask Mr. Fischler to prepare a proposed order and to submit it to Ms. Young for her examination and present it to this Court.

MS. YOUNG: Thank you, Your Honor.

THE COURT: Thank you.

Ms. Young, would you also place a formal appearance within the record within a week's time.

MS. YOUNG: Yes.

THE COURT: Thank you.

(Proceedings adjourned at 4:43 p.m.)

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-1716

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HELEN JEAN GUERCIO,
Plaintiff-Appellant,

v.

HONORABLE GEORGE BRODY, JUDGE, UNITED STATES BANKRUPTCY COURT, and the HONORABLE JOHN FEIKENS, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, sued individually and in their official capacities,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed April 1, 1987

Before: LIVELY, Chief Judge; KEITH and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. This case requires us to draw a line between the administrative and the judicial acts of federal judges. The sole question we address on appeal is whether the doctrine of absolute judicial immunity shields federal judges from any liability for wrongful employment practices.

The District Court dismissed the case on the basis of absolute judicial immunity. In light of our interpretation of the well-settled law that the doctrine of absolute immunity does not extend to the non-judicial acts of judges, we hold that judicial immunity does not apply to the personnel decisions at issue here. We therefore reverse and remand the case to the District Court.

I.

Helen Guercio, the former personal and confidential secretary to Bankruptcy Judge Brody of the Eastern District of Michigan, brought a civil action against Judge Brody and Judge Feikens, Chief Judge of the U.S. District Court for the Eastern District of Michigan, in their individual and official capacities for alleged wrongful termination of her employment. Plaintiff seeks compensatory and punitive damages against both judges in their individual capacities for allegedly discharging her in violation of her First Amendment free speech rights. In addition, plaintiff seeks reinstatement to her former position or a comparable one with back pay and other employment benefits allegedly due.

Defendants moved to dismiss or for summary judgment, and the District Court dismissed plaintiff's amended complaint on the ground that plaintiff's claims are barred by the doctrine of absolute judicial immunity.

The facts of this case, as alleged in the complaint and affidavits of record, lead us through an unfortunate chapter in the history of the U.S. Bankruptcy Court for the Eastern District of Michigan—a period in which Ms. Guercio asserts that she played a central role in exposing corruption in the Bankruptcy Court.

According to the allegations, Guercio was hired in January 1979 by Judge Brody to serve as his secretary. From October 1979 through June 1981, Guercio made various disclosures concerning corruption in the Bankruptcy Court. She

revealed, for example, that the Bankruptcy Court's system of random case assignments was being manipulated. These disclosures eventually led to the resignation of a bankruptcy judge as well as the criminal convictions of an attorney and bankruptcy court clerk.

As part of this chain of events resulting from her disclosures, Guercio alleges that the Judicial Council of the Sixth Circuit intervened and placed the Bankruptcy Court in virtual receivership. The Judicial Council stated in an order dated May 6, 1981:

> The Council concludes that the effective and expeditious administration of the business of the courts within this circuit requires that the administration of the Bankruptcy Court for the Eastern District of Michigan be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision should include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court.

By an order of May 18, 1981, the judges of the U.S. District Court for the Eastern District of Michigan directed Chief Judge Feikens to assume supervisory responsibility for the Bankruptcy Court pursuant to the earlier order of the Judicial Council of the Sixth Circuit.

During the summer of 1981, Guercio circulated articles to the press and others from many years before concerning a lawyer who had recently been nominated to fill the vacancy on the Bankruptcy Court. The articles supposedly disclosed that the nominee had earlier been nominated for the position of U.S. Attorney in 1969 but had withdrawn when it was disclosed that he had represented reputed organized crime figures.

With the approval of Chief Judge Feikens, Judge Brody fired Guercio on October 16, 1981.

II.

The central issue in this case is whether Judges Brody and Feikens were carrying out a judicial act in firing Guercio. The Supreme Court in *Stump v. Sparkman,* 435 U.S. 349 (1978), set forth a two-pronged test for determining whether an act by a judge is a "judicial" one. The first element relates to the "nature of the act itself, *i.e.*, whether it is a function normally performed by a judge." 435 U.S. at 362. The second element concerns the "expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Id.*

Applying the *Stump* test, we believe that the actions of Judges Feikens and Brody clearly fall outside a protected judicial act. We follow generally the reasoning of the Seventh Circuit's recent decision in *McMillan v. Svetanoff,* 793 F.2d 149 (7th Cir.), *cert. denied,* 107 S.Ct. 574 (1986), which addressed this issue in the context of a state judge firing a court reporter. In that case the court stated in pertinent part:

> Hiring and firing of employees is typically an administrative task. It involves decisions of a personal rather than impartial nature, which is integral to judicial decisionmaking. The decision to fire the plaintiff did not involve judicial discretion; in other words, the judge did not utilize his education, training, and experience in the law to decide whether or not to retain plaintiff. The administrative act of firing the plaintiff will not assist the judge in interpreting the law or exercising judicial discretion in the resolution of disputes. Certainly the court reporter assists the judge in his or her judicial capacity, *but so does everyone else employed within the judge's chambers*—the secretary, bailiff, law clerk, court reporter, probation officer, clerk of court, janitor—

> *they all assist in the smooth operation of the judicial process.*

793 F.2d at 155 (emphasis added).

See also Forrester v. White, 792 F.2d at 647, 663 (7th Cir. 1986) (Posner, J., dissenting) ("Judges have both judicial and executive functions. Hiring and firing subordinates are executive functions.")

The crucial mistake in the position adopted by the District Court and argued by defendants is that it conflates official acts of judges into judicial acts and seeks to extend judicial immunity to this broader class of official acts. For the purpose of absolute immunity analysis, this distinction is critical: only judicial acts are cloaked with absolute immunity. *See Stump,* 435 U.S. 349 (1978). Judges may perform many official acts which are not judicial acts. *See, e.g., Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719 (1980) (in promulgating bar code state Supreme Court acted in legislative capacity and not entitled to judicial immunity).

The Supreme Court recognized this fundamental distinction over a century ago in *Ex Parte Virginia,* 100 U.S. 339 (1879). This case involved a county judge indicted for racial discrimination in directing the selection of a jury venire for the county's courts. The judge argued that he could not be prosecuted by performing the judicial act of selecting the venire. The Court rejected the judge's argument in language in harmony with our present case:

> *Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent.* Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is

> not a judicial act. . . . It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, & c. Is their election or their appointment a judicial act?

100 U.S. at 348 (emphasis added).

In this case the District Court committed the same kind of error that the Supreme Court describes in *Ex Parte Virginia*. It confused an administrative or ministerial action with a judicial act. The District Court reasoned that although "the actions of Judge Feikens and Judge Brody were not actions that were taken in the courtroom under the normal advocacy proceedings . . . we believe that the actions of the Judges, whether correct or not, were done within their capacities as Judge of the United States District Court and Judge of the United States Bankruptcy Court for this district." Joint Appendix at 38.

The government argues that Judges Brody and Feikens were performing judicial acts in firing Guercio. It is argued on Judge Feikens' behalf that since Judge Feikens was acting pursuant to an order of the Judicial Council of the Sixth Circuit in approving the firing of Guercio, "Judge Feikens was performing an act by virtue of his judicial capacity." Brief for Appellees at 19. It is also contended that "Judge Brody approached Chief Judge Feikens with the expectation that the latter, as court-ordered receiver of the Bankruptcy Court, would review this matter." *Id.* Defendant argues that in the case of Judge Feikens the conjunction of these two factors satisfies the test under *Stump*.

With respect to Judge Brody, defendants highlight various facts as the basis of immunity: (1) Guercio was hired by Judge Brody pursuant to 28 U.S.C. § 156(a) (1982) which gives a

bankruptcy court judge the authority to employ a secretary; (2) as Judge Brody's confidential secretary, Guercio acted as Judge Brody's "alter ego"; and (3) Judge Brody "severed this confidential relationship with Ms. Guercio in order to improve both his and the Bankruptcy Court's ability to function more effectively and harmoniously." Brief for Appellees at 18-19.

Under these arguments, we see no principled limit to defendants' request for immunity. Under the standard urged by defendants, the doctrine of judicial immunity would sweep far too broadly to cover with absolute immunity the actions of the judicial councils of the federal courts of appeals — despite the fact that those councils plainly have authority over the "nonjudicial activities of the courts of appeals." 28 U.S.C. § 332(e)(1) (1982). Moreover, the doctrine as argued by defendants would also cover hiring and firing decisions of federal judges even though these are administrative decisions.

Other courts, in addition to the Seventh Circuit in *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir.), *cert. denied*, 107 S.Ct. 574 (1986), have agreed that decisions by judges in the personnel context are not judicial acts. *See, e.g., Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982) (screening decisions by judicial selection panel comprised of judges involve "executive" acts); *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D.N.C. 1983) (judge's appointment of magistrates ministerial act), *rev'd on other grounds*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S.Ct. 228 (1985); *Goodwin v. Circuit Court*, 729 F.2d 541, 549 (8th Cir. 1984) (county judge's decision to transfer hearing officer not "official judicial act" but rather "administrative personnel decision"); *Clark v. Campbell*, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981) (county judge, in hiring or firing county employees, exercises administrative and ministerial, not judicial, function). *But see Forrester v. White*, 792 F.2d 647 (7th Cir. 1986) (state judge's alleged wrongful discharge of probation officer entitled to absolute immunity).

This Court has been reluctant to extend the doctrine of judicial immunity to contexts in which judicial decisionmaking is not directly involved. In *Lynch v. Johnson,* 420 F.2d 818 (6th Cir. 1970), a member of a county "fiscal court" sued a county judge, who was serving *ex officio* as the presiding officer, for forcibly removing him from a meeting and jailing him. The Court concluded that the "fiscal court" was not an "ordinary judicial tribunal" and instead could best be characterized as a body through which the "affairs of the county are managed" with powers that are "legislative and administrative" in nature. 420 F.2d at 820. In light of the functions of the "fiscal court," the Court held that the defendant judge was not performing a judicial act during the meeting at issue and was therefore not entitled to the defense of judicial immunity.

In *King v. Love,* 766 F.2d 962 (6th Cir.), *cert. denied,* 106 S.Ct. 351 (1985), an individual who was mistakenly charged with driving while intoxicated brought a civil action against a city court judge after he was jailed for contempt, and then allegedly through the judge's actions, arrested again. The complaint alleged, first, unlawful incarceration by the judge, and, second, illegal arrest by the judge and police officers. The Court held that the incarceration claim was barred by judicial immunity. The Court explained, "Since the Memphis City Court had subject matter jurisdiction over the driving while intoxicated charge against King and since incarcerating King for contempt of court was a judicial act, King may not sue Judge Love for damages stemming from the March 4, 1980 incident." 766 F.2d at 968. The Court held, however, that the illegal arrest claim was not barred by judicial inmunity since on the facts of the case it was not a judicial act.

The Court stated that "the act of deliberately misleading officers who are to execute a warrant about the identity of the person sought well after the warrant has been issued" is not a judicial act. *Id. See also Sevier v. Turner,* 742 F.2d 262,

272 (6th Cir. 1984) (county juvenile court judge's acts initiating criminal prosecution and civil contempt proceeding against father in arrears on child support payments "nonjudicial acts" and judge therefore not immune).

We conclude that a proper application of the *Stump* test requires that the firing of Guercio be deemed a nonjudicial act. The firing of a confidential and personal secretary is hardly the "type of act normally performed *only* by judges." *Stump,* 435 U.S. at 362 (emphasis added). Members of the judicial, legislative, and executive branches routinely engage in the task of hiring and firing confidential personnel. This is an administrative act common to all branches of government and the private sector, not "the type of act normally performed only by judges." Furthermore, the expectations of the parties in this case are that personnel/administrative matters are involved, not judicial acts.

The basic problem with defendants' standard extending immunity to Judges Brody and Feikens for firing Guercio is that it would not serve a central underlying purpose of judicial immunity: promoting fearless and independent decisionmaking by the judiciary. This rationale for judicial immunity was firmly established at the common law.[1] An early seventeenth century opinion

> laid down [the principle] that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself, and it was observed that if they were required to answer otherwise, it would "tend to the scandal and subversion of all justice, and those who are the most sincere, would not be free from continual calumniations."

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[1]For an extensive discussion of the common law origins of the doctrine, *see Pulliam v. Allen,* 466 U.S. 522 (1984).

Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347-48 (1872) (quoting *Floyd v. Barker*, 77 Eng. Rep. 1305 (1607)).

An 1868 opinion by one of the judges of the Court of Exchequer succinctly stated the purpose of judicial immunity:

> "It is essential in all courts that the *judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear.* This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences."

Bradley v. Fisher, 80 U.S. (13 Wall.) at 350 n. (quoting *Scott v. Stansfield*, 3 L.R. Ex. 220 (1868) (emphasis added)).

The Supreme Court, which established the doctrine of judicial immunity in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872),[2] has repeatedly underlined its importance as a safeguard for judicial decisionmaking.[3] In *Pierson v. Ray*, 386

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[2]The Supreme Court in *Bradley* held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 80 U.S. (13 Wall.) at 351.

[3]*See, e.g., Butz v. Economou*, 438 U.S. 478, 512 (1978) ("Absolute inmunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."); *Dennis v. Sparks*, 449 U.S. 24, 31 (1980) (judicial immunity arose to permit judges to decide cases "without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption"); and *Ferri v. Ackerman*, 444 U.S. 193, 203-04 (1979) (immunity helps "forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion").

U.S. 547, 554 (1967), which held that the doctrine retained its force in Section 1983 suits, the Supreme Court stated:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. *Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.* (emphasis added.)

This case does not implicate this central underlying purpose of the doctrine of judicial immunity. The integrity and independence of judicial decisionmaking is in no way impaired if judges are called to account for their personal decisions. Liability for wrongful personnel decisions would not have a chilling effect on the judicial decisionmaking process. Although a judge may exercise discretion and judgment in firing a secretary, it is not the kind of discretion directly connected to independent decisionmaking in the adjudication process which is a paramount concern of the judicial immunity doctrine.[4]

By limiting the application of the doctrine of absolute judicial inmunity in this case, we are giving effect to the principle affirmed by the Supreme Court in *Butz v. Economou*, 438 U.S. 478, 506 (1978):

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:

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[4]For a useful discussion of the underpinnings of the doctrine and citations of related cases, see Note, *What Constitutes A Judicial Act for Purposes of Judicial Inmunity?*, 53 Fordham L. Rev. 1503 (1985).

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it."

(citing *United States v. Lee*, 106 U.S. 196, 220 (1882)).

Conclusion

Accordingly, we reverse the judgment of the District Court based on the doctrine of absolute judicial immunity and remand the case for further proceedings. We intimate no view regarding the First Amendment balancing issue calling for consideration of *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 561 U.S. 138 (1982), or the doctrine of qualified immunity because those issues were not addressed by the District Court and the record is not now adequate to address them on appeal.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-1716

HELEN GUERCIO, PLAINTIFF-APPELLANT

v.

GEORGE BRODY AND JOHN FEIKENS,
DEFENDANTS-APPELLEES

[FILED July 17, 1987]

ORDER

Before: Lively, Chief Judge, Engel, Keith, Merritt, Kennedy, Martin, Jones, Krupansky, Wellford, Milburn, Guy, Nelson, Ryan, Boggs and Norriss, Circuit Judges

A majority of the judges of this court in regular active service have voted for rehearing en banc of this appeal as to appellee John Feikens only. Pursuant to Sixth Circuit Rule 14, it is hereby ORDERED that the previous opinion and judgment of this court as to appellee John Feikens only is hereby vacated, the mandate as to that part of the judgment is stayed, and that part of the case is restored to the active docket as a pending appeal.

The clerk will direct the parties to file supplemental briefs as to John Feikens only and will schedule this case for oral argument as soon as practicable.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-1716

HELEN GUERCIO, PLAINTIFF-APPEALLANT

v.

GEORGE BRODY AND JOHN FEIKENS,
DEFENDANTS-APPELLEES

[FILED July 17, 1987

ORDER

Before: Lively, Chief Judge, Keith and Merritt, Circuit Judges

The court having received from appellee George Brody a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

No. 85-1716

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HELEN GUERCIO,

Plaintiff-Appellant,

v. ORDER

GEORGE BRODY; JOHN FEIKENS,

Defendants-Appellees.

BEFORE: LIVELY, Chief Judge; ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, MILBURN, GUY, NELSON, RYAN, BOGGS and NORRIS, Circuit Judges.

On July 17, 1987, the court entered an order in this case noting that a majority of the judges in regular active service had voted for rehearing en banc of this appeal as to Appellee, John Feikens only. The order went on to state, reciting Sixth Circuit Rule 14, that the previous opinion and judgment of this court as to Appellee John Feikens was vacated and the mandate stayed, with the Feikens portion of the case restored to the active docket as a pending appeal.

On January 12, 1988, the Supreme Court of the United States issued its decision in Forrester, petitioner v. Howard Lee White, respondent, published at 56 U.S. Law Week 4067. Upon consideration of the decision of the Supreme Court this court vacates its order of July 17, 1987, above referred to, and reinstates its decision in this action filed April 1, 1987. That

decision reversed the judgment of the district court and remanded the case for further proceedings. In that decision, this court noted that the district court had considered only the defense of absolute immunity, a ruling which we reversed, and had not considered other issues presented in the case. We noted specifically that the district court had not considered the doctrine of qualified immunity although it had been put forward as an alternate defense.

Upon this remand the district court will consider the entire case in light of the Supreme Court's decision in Forrester v. White and consider the remaining issues in light of Forrester v. White and this court's reinstated decision of April 1, 1987.

Judge Wellford opposes remanding this case to the district court.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

89-1146

HELEN GUERCIO,

Plaintiff-Appellee,

v.

GEORGE BRODY,

Defendant-Appellant,

JOHN FEIKENS,

Defendant.

Before FRIEDMAN, ARCHER and MICHEL, Circuit Judges.

ORDER

Helen Jean Guercio, after being dismissed as the confidential secretary to former bankruptcy judge George Brody, brought a civil action for damages against Judge Brody and John Feikens, then Chief Judge of the United States District Court for the Eastern District of Michigan. Guercio's suit against Judges Brody and Feikens (defendants) claimed infringement of her First Amendment rights because her termination allegedly occurred in retaliation for her public speech. She sought compensatory and punitive damages against the defendants in their individual capacities and reinstatement and back pay from the defendants in their official capacities.

Initially the suit was dismissed on the grounds of absolute judicial immunity, but this decision was reversed in Guercio v. Brody, 814 F.2d 1115 (th Cir.), reh'g granted in banc, 823 F.2d 166 (1987), re-reported 859 F.2d 1232 (6th Cir.), cert. denied, 108 S.Ct. 749 (1988).[1] On remand, Judge Brody moved to dismiss Guercio's second amended complaint on qualified immunity grounds. The district court denied the motion and this appeal followed.[2] Judge Brody also filed an appeal to the Court of Appeals for the Sixth Circuit, which is pending in that court.

Judge Brody, citing the Supreme Court's decision in United States v. Hohri, 482 U.S. 64, 75-76 (1987), contends that jurisdiction lies in this court under 28 U.S.C. § 1295(a)(2) (1982) because the district court's jurisdiction was based in part on a Little Tucker Act claim. See 28 U.S.C. § 1346(a)(2) (1982). We conclude, however, that Guercio's second amended complaint does not state a claim under that Act.

While the Tucker Act (including the Little Tucker Act) provides "consent of the United States to be sued. . . for the classes of claims described in the Act," United States v. Mitchell, 463 U.S. 206, 215 (1983), "the Tucker Act 'does not create any substantive right enforceable against the United States for money damages."' Id. at 216 (quoting United States v. Mitchell, 445 U.S. 535, 538 (1980)); United States v. Testan, 424 U.S. 392, 398 (1976). Some other source of a substantive right to money damages must be found. Mitchell,445 U.S. at 538.

In addition to the relief against the defendants in their individual capacities requested in the second amended complaint, Guercio seeks:

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[1] Appeal to the Sixth Circuit was taken prior to the Supreme Court decision in United States v. Hohri, 482 U.S. 64 (1987).

[2] Appeal was taken from the order denying qualified immunity under the authority of Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

A mandatory injunction ordering defendants to reinstate plaintiff to her former position or an equivalent position, with all compensatory damages, employment rights, privileges, pay and benefits due her, relating back to the date of the illegal and unconstitutional termination of plaintiff's employment. Plaintiff waives all money claims against the defendants in their official capacities and against the United States in excess of . . . $9,999.00. However, plaintiff does not waive any such claims against defendants Brody and Feikens in their individual capacities.

If we assume that this provision is intended to be a claim for back pay against the United States, Guercio has identified no substantive provision entitling her to such money damages.[3]

We have examined the Back Pay Act, 5 U.S.C. § 5596 (b) (1982), which authorizes retroactive recovery of wages whenever "[a]n employee of an agency" has undergone "an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or part of" the compensation to which the employee is otherwise entitled, to see if it could cover Guercio. We conclude that it does not because she is not an employee of an agency within the meaning of the Back Pay Act.

While an "agency" is defined to include "the Administrative Office of the United States Courts," 5 U.S.C. § 5596(a)(2) (1982), Guercio is not considered to be such an

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[3] Guercio has not directly claimed money damages against the United States because the United States has not been made a party to this proceeding. The Tucker Act by its terms is limited to suits against the United States. See 28 U.S.C. § 1346(a) (1982); also see Van Drasek v. Lehman, 762 F.2d 1065, 1069-70 (D.C. Cir. 1985). In view of our decision, however, that no source of a —substantive right enforceable against the United States for money damages— has been set forth in the second amended complaint, we need not decide whether the United States as a proper party defendant could be named at this stage.

employee. See 28 U.S.C. §§ 601, et seq.[4] Rather, she is an employee of the court to which she was appointed and which exercised hiring authority over her. 28 U.S.C. § 609 (1982). In this connection, 28 U.S.C. § 772 (1982) provides that "[b]ankruptcy judges may appoint necessary other employees, including . . . secretaries."

Since the Back Pay Act is inapplicable to the confidential secretary of a bankruptcy judge, Guercio cannot avail herself of that Act to claim a substantive right to the payment of money against the United States. See Mitchell, 445 U.S. at 538; Testan, 424 U.S. at 398. Moreover, we are not aware of any other statutory or regulatory authority that might entitle a person in Guercio's position to an award of back pay and none has been cited in the complaint.

In view of the foregoing, the district court did not have jurisdiction over a claim satisfying the requirements of the Little Tucker Act, and for that reason we are without jurisdiction to hear this appeal. Cf. United States v. Hohri, 482 U.S. at 75-76.

Accordingly, IT IS ORDERED that the appeal is dismissed.

FOR THE COURT

Date: 9/6/89

Glenn Archer, Jr.
Circuit Judge

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[4] 28 U.S.C. § 602 (1982) provides the Director of the Administrative Office with the authority to "appoint and fix the compensation of necessary employees of the Administrative Office." Separately, 28 U.S.C. § 609 (1982) provides that "[t]he authority of the courts to appoint their own administrative or clerical personnel shall not be limited by any provisions of this chapter."

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HELEN JEAN GUERCIO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 84-CV-4736-DT
	)	
GEORGE BRODY	)	
and	)	
JOHN FEIKENS,	)	
	)	
Defendants.	)	
	)	

SECOND AMENDED COMPLAINT
FOR DAMAGES AND INJUNCTIVE AND
DECLARATORY RELIEF

Jurisdiction

1. This action is brought pursuant to the First Amendment to the United States Constitution and Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Jurisdiction is founded upon 28 U.S.C. Sections 1331, 1343, and 2201. Plaintiff further invokes the pendent jurisdiction of this Court.

2. This is a second amended complaint for monetary, injunctive and declaratory relief, based on plaintiff's claims that she was discharged from her employment as a legal secretary with the Bankruptcy Court for the Eastern District of Michigan in violation of her First Amendment rights. While the matter in controversy exceeds $10,000.00, plaintiff waives all monetary claims against the United States in excess of $9,999.00, but does not waive such claims against defendants Brody and Feikens individually.

Parties

3. Plaintiff Helen Jean Guercio is a citizen of the United States and a resident and citizen of the State of Michigan.

4. Defendant George Brody was at all times relevant to this complaint a Judge of the Bankruptcy Court for the Eastern District of Michigan. He had general authority to hire legal secretaries. Defendant Brody, upon information and belief, resides in Southfield, Michigan. He is sued in both his individual and in his official, administrative capacities.

5. Defendant John Feikens was at all times relevant herein the Chief Judge of the United States District Court for the Eastern District of Michigan. At all relevant times herein, the Bankruptcy Court, in a transitional state under the 1978 Bankruptcy Act, 28 U.S.C. Sec. 151, et seq., was under the authority of the United States District Court. At all times relevant herein, defendant Feikens was responsible for the administration of the Bankruptcy Court operations, including personnel administration. Defendant Feikens, upon information and belief, resides in Ann Arbor, Michigan. He is sued in both his individual and administrative capacities.

Factual Allegations

6. Plaintiff Guercio was formerly employed by defendant Brody in January 1979 as a legal secretary for his office within the Bankruptcy Court for the Eastern District of Michigan ("Bankruptcy Court"). She worked in that capacity for almost three years, until October 1981.

7. Plaintiff's principal responsibility was to provide defendant Brody with the legal secretarial services he required in his capacity as a federal bankruptcy judge. During her entire career, and included her tenure in defendant Brody's office, plaintiff performed her duties in a competent and professional manner to the satisfaction of all who supervised her or all to whom she reported.

8. In October 1979, Plaintiff learned from other Bankruptcy Court personnel and attorneys with whom she had a professional relationship that the Bankruptcy Court's system of random case assignments was being manipulated. The system was supposed to randomly assign each bankruptcy case as it was filed to one of three Bankruptcy Court judges, including defendant Brody. The goal of the "blind draw" system was the prevention of "judge-shopping" by attorneys. Because of the manipulation, the majority of large bankruptcy cases were assigned to Bankruptcy Judge Harry Hackett. The Clerk's Office, primarily Clerk Kathy Bogoff, assigned bankruptcy cases involving corporate reorganizations under Chapter 11 (11 U.S.C. Sec. 1101, et seq.) to Judge Hackett. Hackett would in turn award generous attorney's fees to a lawyer who primarily handled these cases, Irving August.

9. During the same period of time, plaintiff also learned that the Chief Clerk of the Bankruptcy Court, William Harper, was abusive toward women, accepted favors from lawyers, was often drunk on the job, and engaged in patronage activities in the Clerk's Office. Harper, who was Bogoff's supervisor, was formerly the manager for the United States District Court for the Eastern District of Michigan, under the direction of defendant Feikens.

10. In December 1979, plaintiff called defendant Feikens on a "hotline" established for internal matters and informed him about the manipulation of the random case assignment system in the Bankruptcy Court. Plaintiff also informed defendant Feikens of Harper's improper and illegal conduct. Defendant Feikens stated to plaintiff that he could do nothing about plaintiff's allegations.

11. In May 1980, plaintiff informed William Trencher and Milner Benedict of the Administrative Office of the United States Courts ("AO") in Washington, D. C., about the problems with the random assignment system and about Harper's improper and illegal conduct. Plaintiff and others reported to the AO throughout the summer of 1980 about the problems in the

Bankruptcy Court, but, upon information and belief, there was little the AO could do without an order from defendant Feikens allowing an investigation, and defendant Feikens withheld that necessary consent.

12. In June 1980, plaintiff informed defendant Brody about the intentional and improper manipulation of the system of random assignment of cases. Defendant Brody indicated that he did not belief plaintiff's assertions.

13. Upon information and belief, in September 1980, defendant Feikens forward to the AO a complaint made by an Assistant United States Attorney concerning a sexist remark made to her by Hackett. In October 1980, defendant Feikens agreed to issue an order allowing AO investigators to begin an investigation of the matter.

14. The AO conducted an investigation relying in substantial part upon information provided by plaintiff. Based on its investigation, the AO made certain charged against Harper, including sexual harassment of employees of the Bankruptcy Court, intoxication on the job, abusive behavior, patronage activities in the Clerk's Office, and improper receipt of gifts. The investigation also disclosed evidence of possible criminal violations by Harper and others involving allegations of manipulation of case assignments and improper dealings with attorneys or parties before the Bankruptcy Court. The AO referred evidence of possible criminal conduct to the United States Attorney, including information concerning the illegal manipulation of the case assignments conducted by Hackett, August and Bogoff.

15. In January 1981, plaintiff learned that Harper had illegally bought property from a bankruptcy estate using a false name. The transaction was in direct violation of the law. In or about May 1981, plaintiff provided to the Federal Bureau of Investigation ("FBI") information about Harper's transactions. Subsequently, Harper was convicted of Prohibited Purchase of Property from the Estate of a Bankrupt by a Court Officer in

violation of 18 U.S.C. Sec. 154.1

16. On or about June 22, 1981, the Michigan Merit Screen Commission found Hackett unfit to remain on the Bankruptcy Court bench after twenty-five years of service. On June 24, 1981, U. S. Circuit Court Chief Judge George Edwards ruled against Hackett. On the same day Hackett resigned.[5]

17. Shortly after Hackett resigned, a committee of federal district court judges nominated attorney George E. Woods to replace Hackett as a Bankruptcy Judge. A three–attorney screening committee of Michigan attorneys approved the judges' nomination of Woods. Woods' nomination generated much public controversy, was widely criticized and defended, and was the subject of extensive media coverage.

18. In the summer of 1981, plaintiff learned that nominee Woods had, in 1969, been nominated to become a United States Attorney, but had had his nomination withdrawn after Woods' representation of and contacts with reputed organized crime or racketeering figures was publicized.

19. In the summer of 1981, plaintiff discovered old newspaper articles describing the controversy over Woods' 1969 nomination for U. S. Attorney and its subsequent withdrawal. Plaintiff informed defendant Brody about the newspaper articles she had discovered regarding Woods and that she intended to distribute the articles to, among others, the committee considering Woods for the Bankruptcy Court judgeship. Defendant Brody neither requested that plaintiff not disclose these articles to anyone, nor did he express any concern that her disclosure would in any way affect her ability to perform her work.

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[5] On March 19, 1982, bankruptcy attorney August and court clerk Bogoff were indicted for Conspiracy to Defraud (18 U.S.C. Sec. 317), Obstruction of Justice (18 U.S.C. Sec. 1503), Receipt of Gratuities (18 U.S.C. 201(9)), and Bankruptcy Fraud (18 U.S.C. Sec. 152). Bogoff

20. Plaintiff sent copies of the 1969 newspaper articles she had discovered concerning nominee Woods to the FBI, the AO, the judges' nominating committee, the United States Attorney's Office, and various newspaper reporters.

21. Thereafter, Woods informed defendant Brody that, because plaintiff had distributed the 1969 newspaper articles, Woods would, if appointed, refuse to work with defendant Brody unless plaintiff's employment were terminated. Defendant Brody thereupon discussed with defendant Feikens the demand by Woods that plaintiff be fired.

22. All of the alleged events during which defendants Brody and Feikens learned of the fact that plaintiff had distributed the 1969 articles on nominee Woods occurred during the period Woods was under consideration for appointment to the Bankruptcy Court.

23. Upon information and belief, Judge Feikens demanded that Judge Brody terminate plaintiff's employment in light of the above disclosures concerning Woods. On October 16, 1981, Judge Brody did terminate plaintiff's employment.
24. Defendants Feikens and Brody were motivated to effect and did effect plaintiff's termination solely because of her participation in exposing corruption in the Bankruptcy Court and her distribution of the 1969 newspaper articles critical of the nominee who was being considered to replace the judge whose corruption had been exposed by plaintiff. At all times relevant herein, defendants were aware of plaintiff's participation in exposing corruption in the court and of her distribution of articles relevant to the Woods nomination.

25. Plaintiff never personally criticized nominee Woods and her activities concerning Woods were limited solely to disclosures of newspaper articles containing information relevant to concerns of the nominating committee. The disclosures were made in good faith, and accomplished entirely on her own time with her own resources.

26. Plaintiff's distribution of the newspaper articles had not caused any disruption in her performance of her duties or her ability to work with others in the course of performing her duties. Plaintiff's duties were such that she had very little contact with the staff of the Bankruptcy Court. Plaintiff's office was on the tenth floor, whereas the staff worked on the first floor. With respect to Woods, no disruption of the workplace could have occurred, since Woods' nomination was still pending, and he had not been appointed to or had any official connection with the Bankruptcy Court at the time plaintiff was fired.

27. The disruption in the Bankruptcy Court workplace, if any, that may have resulted from plaintiff's disclosures regarding the manipulation of the random assignment system and other disclosures of illegal activity, was minor, and such disruption, if any, was in fact caused only by those associated with or sympathetic to the persons whose illegal activities plaintiff had participated in exposing. Such disruption, if any, played no part in defendants' motivation in terminating plaintiff's employment.

28. On information and belief, in further retaliation for plaintiff's exposures of illegalities and her distribution of the 1969 articles concerning Woods, defendant Feikens, shortly after terminating plaintiff's employment, caused two FBI agents to come to plaintiff's home at night to question plaintiff about her distribution of the newspaper articles.

Cause of Action
(Violation of Plaintiff's First Amendment Rights)

29. Plaintiff realleges and incorporates herein each and every allegation contained in paragraphs 1 through 28 of the complaint, and additionally alleges as follows.

30. Plaintiff's disclosures described in paragraphs 8 through 27 hereof are protected activity under the First Amendment to the United States Constitution. Plaintiff's exercise

of free speech did not violate the terms and conditions of her employment, and therefore by making said disclosures plaintiff engaged in no misconduct.

31. By denying plaintiff her rights under the First Amendment to speak on matters of public concern, defendants Feikens and Brody deprived plaintiff of her rights and privileges secured by the Constitution, and their acts were intentional, unreasonable and taken in bad faith, or alternatively in disregard of their duties.

32. In acting as alleged herein, defendants terminated plaintiff's employment arbitrarily, without just cause, and in violation of fundamental public policies of law, because, inter alia, the retaliatory firing constitutes an unconstitutional deprivation of plaintiff's First Amendment right to express herself on matters of clear public concern. Notwithstanding the knowledge as alleged, defendants acted oppressively, maliciously, fraudulently and outrageously towards plaintiff, with conscious disregard for her known rights and with the intention of causing, or willfully disregarding the possibility of causing, unjust and cruel hardship to plaintiff. In so acting, defendants intended to and have vexed, injured and annoyed plaintiff.

33. As a direct and proximate result of the defendants' actions alleged herein, plaintiff sustained substantial economic losses, including her past and future compensation, and other economic benefits, and incurred litigation expenses. Plaintiff also sustained embarrassment, humiliation, mental and emotion distress and discomfort, and anguish, all to her detriment and damage in amounts not fully ascertained but within the jurisdiction of this Court and provable at the time of trial, and which warrant exemplary damages.

Prayer for Relief

WHEREFORE, the premises considered, plaintiff prays for judgment against defendants and each of them as follows:

1. A declaration that defendants' dismissal of plaintiff from her employment was illegal, unconstitutional, arbitrary and without just cause, and in retaliation against plaintiff for her exercise of her rights secured by the First Amendment to the United States Constitution.

2. A mandatory injunction ordering defendants to reinstate plaintiff to her former position or an equivalent position, with all compensatory damages, employment rights, privileges, pay and benefits due her, relating back to the date of the illegal and unconstitutional termination of plaintiff's employment. Plaintiff waives all money claims against the defendants in their official capacities and against the United States in excess of in excess of $9,999.00. However, plaintiff does not waive any such claims against defendants Brody and Feikens in their individual capacities.

3. A judgment against defendants, jointly and severally, in their individual capacities, awarding compensatory damages to plaintiff in the amount of One Million Dollars ($1,000,000.00) to reimburse her for all salary and employment benefits lost to her as a result of defendants' violation of her rights under the First Amendment to the United States Constitution, and for injury to her professional career, to her reputation, and for the mental and emotional distress caused plaintiff by defendants.

4. A judgment against defendants, jointly and severally, in their individual capacities, awarding plaintiff One Million

Dollars ($1,000,000.00) in punitive damages for violation of her rights under the First Amendment to the United States Constitution.

5. An award of reasonable attorneys' fees and costs of this action.

6. Such other and further relief as this Court deems just and proper.

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Dated: June 20, 1988.

(2)

No. 90-1027

In the Supreme Court of the United States

OCTOBER TERM, 1990

HELEN JEAN GUERCIO, PETITIONER

v.

GEORGE BRODY AND JOHN FEIKENS, FORMER JUDGES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT BRODY IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held that a bankruptcy court judge was entitled to qualified immunity from liability in damages in a *Bivens* action against him arising out of the dismissal of his secretary.

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BRIEF FOR RESPONDENT BRODY IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 3a-29a) is reported at 911 F.2d 1179. The decision of the district court with regard to respondent George Brody (App., *infra*, 1a-8a) is unreported. The decision of the district court with regard to respondent John Feikens (Pet. App. 30a-42a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1990 (Pet. App. 2a). A petition for rehearing was denied on September 25, 1990 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the late 1970s, the U.S. Bankruptcy Court for the Eastern District of Michigan (Bankruptcy Court) comprised four judgeships, three of which were assigned to Detroit.[1] At that time, respondent George Brody was a judge in the Detroit Division of the Bankruptcy Court. Respondent John Feikens was then Chief Judge of the Eastern District of Michigan (District Court). Petitioner was Judge Brody's secretary from January 1979 through October 1981, when Judge Brody dismissed her.

During this period, corruption was uncovered in the Detroit Division of the Bankruptcy Court. Investigations by the Administrative Office of the United States Courts (AO) and by law enforcement officials led to the resignation of one of the Bankruptcy Court judges and to the convictions of court personnel.

On May 6, 1981, the Judicial Council of the Sixth Circuit ordered the Bankruptcy Court placed under the direct supervision of the District Court. The Council's order stated that this action was necessary for "the effective and expeditious administration of the business of the courts within this circuit." Pet. App. 5a (quoting Judicial Council order of May 6, 1981). Under the order, the supervision included "the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court." *Ibid.* By subsequent order of May 18, 1981, the District Court delegated this supervisory authority—including authority over personnel actions—to Judge Feikens. *Id.* at 6a.

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[1] 28 U.S.C. 152 (1978); 28 U.S.C. 152(a)(1)-(2) and (b)(1) (1984).

2. Petitioner brought a *Bivens* [2] action against respondents in the United States District Court for the Eastern District of Michigan, alleging that, in violation of her rights under the First Amendment, respondents had terminated her for her role in exposing corruption in the Bankruptcy Court. Petitioner sought civil damages and equitable relief, including reinstatement. Pet. App. 69a-78a.

Petitioner alleged that in late 1979 she became aware of improprieties in the Bankruptcy Court concerning the system for assigning cases to judges. Beginning in May 1980, petitioner reported these and other irregularities [3] to the AO, which began an investigation in October 1980. Petitioner also provided information to the FBI, and at some point a criminal investigation began. Pet. App. 71-73a.

Petitioner further alleged that, in June 1981, one of the three Bankruptcy Court judges resigned. Shortly thereafter, a committee of District Court judges nominated George Woods to fill the vacancy. Woods' nomination was then approved by a screening committee of Michigan attorneys. After Woods had been approved by the committee, but before he was appointed, petitioner found some newspaper articles about Woods' unsuccessful bid for a position as a United States Attorney in 1969. Petitioner sent copies of the articles to the nominating committee, the AO, the FBI, and "various newspaper reporters." Pet. App. 73a-74a.

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[2] *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[3] The other irregularities alleged were that the Clerk of the Court "was abusive toward women, accepted favors from lawyers, was often drunk on the job, and engaged in patronage activities in the Clerk's Office." Pet. App. 71a.

Petitioner alleged that Woods told Judge Brody that, if appointed, Woods would not work with Brody unless Brody fired petitioner. Petitioner also alleged that Judge Brody terminated her employment at Judge Feikens' direction. The termination was allegedly motivated by "her participation in exposing corruption in the Bankruptcy Court and her distribution of the 1969 newspaper articles." Pet. App. 74a.

3. The district court initially dismissed the action on grounds of absolute immunity. Pet. App. 43a-48a. A panel of the Sixth Circuit reversed, *Guercio* v. *Brody*, 814 F.2d 1115 (1987), but that decision was later vacated pending rehearing en banc, 823 F.2d 166 (1987). After this Court issued its decision in *Forrester* v. *White*, 484 U.S. 219 (1988), the Sixth Circuit vacated the order granting rehearing en banc, reinstated its mandate, and remanded the case to the district court for consideration in light of *Forrester*. Pet. App. 63a-64a. On remand, the district court denied motions by each respondent to dismiss on grounds of qualified immunity. See *id.* at 30a-42a (order denying Judge Feikens' motion); App., *infra*, 1a-8a (order denying Judge Brody's motion). Each respondent appealed, and the appeals were consolidated.

4. The court of appeals reversed, relying on *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), to hold that respondents were entitled to qualified immunity. Pet. App. 3a-29a.[4]

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[4] The court of appeals understood petitioner to allege that Judge Brody terminated petitioner "only upon direction from Feikens, and not for independent reasons or on [Brody's] own initiative." Pet. App. 22a n.6. Based on this understanding, the court analyzed the "qualified immunity question * * * from the perspective of Judge Feikens, only." *Ibid.* With respect to Judge Brody, the court held: "Having concluded that

The court observed that petitioner's complaint depicted her as a "disseminator of matters of ostensible public interest," and thus implicated her rights under the First Amendment. Pet. App. 9a. The court accordingly framed the issue as whether, accepting the allegations in the complaint as true, "[petitioner's] rights were so clearly established when she was terminated that Judge Feikens should have understood that his conduct at the time he ordered her discharged violated her first amendment right to free speech." *Ibid.* (citing, inter alia, *Anderson* v. *Creighton*, 483 U.S. 635 (1987)).

The court recognized (Pet. App. 10a) that, at the time of petitioner's discharge, the right of a public employee to speak on matters of public concern had been "clearly established" in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). *Pickering* had enunciated a by-then "familiar rule of balance" that required weighing "a public employee's interest in commenting on matters of public concern" against "the employer's interest in 'promoting the efficiency of the public services it performs through its employees.'" Pet. App. 10a (quoting *Pickering*, 391 U.S. at 568).

The court further recognized that, under *Harlow*, its inquiry could not end at this point. "[T]he *Harlow* test * * * in the first instance require[s] a determination of whether a clearly established right was alleged to have been violated, and, secondly, a determination of whether a reasonable public official should have known that the conduct at issue was undertaken in violation of that right." Pet. App.

Feikens is entitled to immunity, then Brody, too, benefits from that determination." *Ibid.* Petitioner does not challenge that approach here, nor does petitioner dispute the court of appeals' characterization of her allegations in this regard.

11a; see also *id.* at 12a (quoting *Anderson* v. *Creighton* for the proposition that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). The second determination entailed inquiry whether during the period 1979 through 1981

> judges of reasonable competence in the position of Judge Feikens * * * could have disagreed upon whether [petitioner's] right to exercise her * * * right to free speech without being terminated was * * * outweighed by the public interest in restoring morale, cooperation, dignity, public respect, and confidence to the United States Bankruptcy Court for the Eastern District of Michigan, a court that had been corroded by corruption and favoritism.

Pet. App. 14a.[5]

In considering petitioner's allegations, the court observed that petitioner's reports prompted Judge Feikens to request the AO investigation. Pet. App. 16a. The court noted that the AO investigation and other investigative efforts led the Judicial Council to place the Bankruptcy Court under the direct supervision of the District Court. *Ibid.* By June 1981, a Bankruptcy Court judge resigned, as did other court personnel implicated in the wrongdoing. *Ibid.* Thus, through the early summer of 1981, efforts to rehabilitate the Bankruptcy Court were "progressing expedi-

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[5] The public interest so identified derived from the Judicial Council order and the subsequent order of the District Court; the District Court order, which implemented the Council's order, "was directed primarily at rehabilitating the Court, and expressly conferred upon Judge Feikens * * * responsibility for approving all personnel actions." Pet. App. 16a (internal quotation marks omitted).

tiously and effectively." *Id.* at 17a. During this time, petitioner "was neither admonished for nor discouraged from pursuing her activities." *Id.* at 16a.

The court then considered the petitioner's further efforts to distribute certain 1969 newspaper articles about nominee Woods. The court noted that petitioner circulated the articles after Woods had been nominated and after the procedures required prior to appointment had ended. Pet. App. 19a. The court also observed that "the circulation was not accompanied by any newly discovered disclosures of concealed past or current misdeeds or wrongdoing." *Ibid.* Further, in circulating the 1969 articles, petitioner did not attest to their truthfulness or express any opinion on Woods' nomination. *Ibid.*

The court also assessed how a competent judge in Judge Feikens' position would have viewed petitioner's activities. The court noted that the statutes in effect in 1981 created an "interdependent working relationship * * * between the bankruptcy and district courts and the judges thereof." Pet. App. 14a. This relationship, coupled with the Judicial Council order, posed a "potential for internecine conflict in the court." *Id.* at 15a. As a result, "[c]oncerns for inter-chamber harmony, cooperation, and collegiality between judges and court personnel * * * were in all probability central and indispensable to the efforts of Judge Feikens to implement the Sixth Circuit's mandate." *Ibid.*

Implementing the Sixth Circuit's mandate, the court noted, required "expeditiously appointing a judge to the vacancy created by the resignation." Pet. App. 19a. In carrying out this responsibility, a competent judge—"[m]indful * * * of the incipient confrontation manifested by the bitter resentment Woods displayed when he advised Judge Brody that

he would, if appointed, refuse to work with Brody unless [petitioner's] employment were terminated"—could reasonably conclude that by the summer of 1981 "[petitioner's] expression and activities had become a force counterproductive and disruptive to the ongoing effort to rehabilitate and revitalize the operation of the Detroit Bankruptcy Court." *Id.* at 19a-20a.

In these circumstances, the court held, "[petitioner's] right to protection under the first amendment was not so clearly established at the time that Feikens ordered her termination that any judge of reasonable competence * * * would have clearly understood that he was under an affirmative duty to have refrained from such conduct." Pet. App. 22a. Judges of reasonable competence could reasonably have disagreed on two issues: (1) whether and to what extent petitioner's various activities all involved matters of public concern; and (2) "where the *Pickering* scale, with all of the parties' competing interests in the balance, would ultimately come to rest." *Ibid.* Based on this holding, the court, over Judge Wellford's dissent, reversed and remanded the case with instructions to dismiss petitioner's claims for money damages.[6]

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[6] The court of appeals went on to address petitioner's claims for equitable relief against respondents in their official capacity. Petitioner advises (Pet. 6) that these claims have now been dismissed by stipulation.

ARGUMENT

The facts alleged in this case are exceptional, but the legal issues are not. The court of appeals applied well-settled principles of qualified immunity to dismiss the claim of a public employee alleging infringement of her right to free speech. The court of appeals' decision is correct and in any event presents no issue warranting review by this Court.

1. As the court of appeals recognized, respondents' defense of qualified immunity required the court to apply the standard set forth in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982):

> [G]overnment officials, performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

The specific right allegedly violated here further required the court "to seek 'a balance between the interest of the [petitioner], as a citizen, in commenting upon matters of public concern and the interest of the * * * employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick* v. *Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering*, 391 U.S. at 568). The court of appeals properly undertook this task, in light of petitioner's claim of retaliatory action, within the framework of "objective legal reasonableness" enunciated in *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). The court correctly framed the issue as whether during the relevant time period

> judges of reasonable competence in the position of Judge Feikens * * * could have disagreed

> upon whether [petitioner's] right to exercise her * * * right to free speech without being terminated * * * was outweighed by the public interest in restoring morale, cooperation, dignity, public respect, and confidence to the United States Bankruptcy Court for the Eastern District of Michigan * * *.

Pet. App. 14a.

To resolve that issue on the facts of this case, the court of appeals similarly relied on firmly established doctrine. The court recognized that the issue was to be decided "exclusively upon the allegations incorporated into the complaint, which must, for purposes of considering the motion to dismiss, be accepted as true." Pet. App. 9a (citing, *inter alia*, *Hishon* v. *King & Spaulding*, 467 U.S. 69, 73 (1984), and *Walker Process Equip., Inc.* v. *Food Machinery & Chem. Corp.*, 382 U.S. 172, 174-175 (1965)). Contrary to petitioner's contention (Pet. 8), it is not "unique" for a court to resolve a question of qualified immunity on the basis of pleadings and prior to discovery. Indeed, "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery" where, as here, the plaintiff's allegations do not demonstrate a violation of clearly established law. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985).

Petitioner also errs in suggesting (Pet. 7) that the distinctive nature of the facts alleged justifies review by this Court. On the contrary, every case that presents a *Pickering*-type claim entails "particularized balancing." *Connick*, 461 U.S. at 150. The invariable "difficult[y]" (*ibid.*) of striking this balance on the facts of each case does not make each such case suitable for review in this Court.

2. Petitioner contends (Pet. 12-16) that in several instances the court of appeals incorrectly characterized the allegations set forth in her complaint. That fact-bound contention is incorrect and in any event does not warrant further review.

Contrary to petitioner's assertions here (Pet. 12-13), the court of appeals correctly observed that petitioner conceded in her complaint that her activities "affected to some degree the operation of the Bankruptcy Court." Pet. App. 19a. The portion of the complaint to which the court was referring alleged:

> 27. The disruption in the Bankruptcy Court workplace, if any, that may have resulted from plaintiff's disclosures * * * was minor, and such disruption, if any, was in fact caused only by those associated with or sympathetic to the persons whose illegal activities plaintiff had participated in exposing.

Id. at 75a. The court of appeals clearly was correct to understand these allegations as acknowledging some workplace disruption traceable to petitioner's activities.[7]

Petitioner is also mistaken in asserting (Pet. 13) that the court below "assume[d] knowledge of Judge Feikens' subjective motivations." Petitioner relies for this assertion on the court's discussion of Judge Feikens' responsibilities under the Judicial Council order of May 6, 1981. Pet. App. 15a. Petitioner's reliance is misplaced. The court properly analyzed Judge Feikens' mandate under the Sixth Circuit's or-

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[7] Elsewhere in the complaint (Pet. App. 75a (Compl. para. 26)), petitioner alleged that her distribution of newspaper articles did not disrupt "her performance of her duties or her ability to work with others." Nothing in the opinion below suggests that the court of appeals doubted this separate allegation.

der to discern the "factual backdrop" (*ibid.*) for the judge's decision to terminate petitioner. That analysis, as the court emphasized, was a necessary part of "an informed assessment * * * focus[ing] on the *objective reasonableness* of an official's act." *Id.* at 21a (emphasis added).[8]

Petitioner's other fact-specific objections to the court of appeals' opinion are likewise without merit.[9]

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[8] It appears that the court of appeals, in its analysis of the qualified immunity issue, assumed the truth of petitioner's allegations as to respondents' motivation. See Pet. App. 15a-21a. Thus, this case does not raise any of the questions currently pending before this Court in *Siegert* v. *Gilley*, No. 90-96 (argued Feb. 19, 1991).

[9] Contrary to petitioner's assertion (Pet. 14), the court of appeals correctly observed (Pet. App. 19a) that petitioner circulated newspaper articles about nominee Woods after Woods had been nominated and had gone through the screening procedure for nominees. The court also recognized that the circulation allegedly occurred "prior to [Woods'] confirmation" (*id.* at 6a). Petitioner is misguided when she criticizes the court (Pet. 14) for inferring (Pet. App. 17a) that, through the early summer of 1981, efforts to rehabilitate the Bankruptcy Court were paying off. That inference was justified by petitioner's own allegations of her significant role in these efforts and their success. *Id.* at 71a-73a. Finally, petitioner is wrong to take issue with the court's observation (*id.* at 16a) that the "[AO] initially withheld formal action on [petitioner's] original submissions." That is what petitioner's complaint says. *Id.* at 71a-72a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1991

APPENDIX

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action # 84 CV 4736 DT

HELEN GUERCIO, PLAINTIFF

-vs-

GEORGE BRODY and JOHN FEIKENS, DEFENDANTS

JUDGE'S RULING ON MOTION TO DISMISS

Proceedings held in the above-entitled matter, before the HONORABLE JULIAN ABELE COOK, JR., U.S. District Judge, at 237 U.S. Courthouse and Federal Building, Detroit, Michigan, on Tuesday, September 6, 1988.

APPEARANCES:

THOMAS J. MACK, ESQ.
Appearing on behalf of Plaintiff.

R. JOSEPH SHER, ESQ.
Appearing on behalf of Defendant, George Brody.

JAMES K. ROBINSON, ESQ.
Appearing on behalf of Defendant, John Feikens.

[2]

Detroit, Michigan
Tuesday, September 6, 1988
Morning Session

THE COURT: All right. Thank you.

Defendant George Brody has filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12 (b), in which he argued that the complaint which was filed by the Plaintiff Helen Guercio should be dismissed because of the often cited *Bivens* versus *Six Unknown Agents* or governmental immunity. The Plaintiff has filed pleadings in opposition to the instant motion.

For reasons which will be noted later, the Court will deny the Defendant's motion as it relates to *Bivens* and governmental immunity. The Defendant's motion to dismiss with regard to Judge Brody's involvement as an officer of the court will be taken under advisement as a result of the brief colloquy between the Court and counsel.

On October 15, 1984, the Plaintiff filed a complaint in this court for, quote, declaratory injunctive and monetary relief. She bases her claims on the First, Fourth and Fifth Amendments to the United States Constitution. The complaint which has been brought resurrects a sad chapter in the Bankruptcy Court [3] of the United States. Following a series of media accounts with regard to the then alleged improper activities, followed by the resignation of a Bankruptcy Court Judge and the criminal prosecution of at least two persons who were involved in the wrongdoings, George Woods, who was subsequently appointed to serve as a Bankruptcy Judge and later elevated to the District Court, had had his name

placed in nomination for appointment. The Plaintiff allegedly forwarded newspaper clippings about nominee Woods to the Congressional Committee, who had the responsibility of investigating and making a recommendation with regard to the acceptability of the nominee.

According to the complaint, the Plaintiff had served as the legal secretary for Judge Brody for approximately three years between 1979 and October, 1981 when she was discharged. It follows as a result of the discharge that the Plaintiff has instituted this suit, claiming, in essence, that Judge Brody and his Co-Defendant Judge John Feikens, who then served as the Chief Judge of this court and now serves as a Senior Judge of this court, had violated her constitutional rights and had caused her injury in that her reputation, as well as her ability to obtain future employment had been severely impaired.

[4] This matter has been presented to the 6th Circuit Court of Appeals on another matter. The case has now been returned to this Court. Hence, the Court now has jurisdiction to resolve or attempt to resolve those issues which are presently in controversy.

The Defendant, in challenging the Plaintiff's *Bivens* claims, makes two arguments as to why he believes that the *Bivens* claim should be dismissed. His first and primary argument is that there has been no constitutional violation shown. In support thereof, he relied upon a series of cases which originated in the Supreme Court which, in essence, hold that although the Constitution places some limitations on the discharge of public employees, it never extended to those officials such as Judge Brody when and if they dismiss a staff person, who enjoys a con-

fidential relationship, because that staff person may have or have had differing viewpoints. The Defendant Judge Brody relies upon the *Elrod* and *Branti* cases to which reference has been made today.

The Plaintiff, in her opposition to this argument, contends that the *Elrod* and *Branti* cases are inapplicable in that they do not allege that her dismissal was motivated by political animosity or patronage. Thus, it is the Plaintiff's view that both *Elrod* and *Branti* are distinguishable.

[5] Both parties have cited the *Pickering* case, which was decided by the Supreme Court in 1968, in which the Supreme Court held impermissible under the First Amendment the dismissal of a high school-teacher who had openly criticized the Board of Education on its allocation of school funds. As both counsel have acknowledged expressly or implicitly, that none of the cases which they have cited fit squarely on the facts of this case. However, it appears that the case which comes closest to providing this Court with some form of instruction or guidance is the *Pickering* versus *Board of Education* case, which was decided by the Supreme Court in 1968.

At page 568 of that opinion, the Court stated in part as follows:

> "The problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees."

Thus, it would appear that the *Pickering* Court emphasized that an employee should not be sanctioned, because she did not work for the person or the people [6] whom she criticized. And, thus, ac-

cording to the *Pickering* rationale, there was little chance of disruption or disharmony in the work force.

The counsel for the Plaintiff has made reference to the *Columbus Education Association* case, which was decided by the 6th Circuit in 1980. The Court in *Columbus* stated at page 1160 that the relevant factors which would justify any regulation of an employee's speech include:

> ". . . the content of the speech, co-worker harmony, maintaining discipline by immediate supervisors, need for personal loyalty and confidence between workers and supervisors."

In the judgment of this Court, there appear to be several problems with the arguments which have been presented on behalf of Judge Brody. First, the mere fact that a balancing test which utilizes several factors involved makes this case extremely inappropriate for dismissal, especially in view of the many fact issues which are involved. Counsel for the Plaintiff has correctly noted, as has the counsel for the Defendant Brody, that this Court is obliged to deny any motion unless it can be established that the Plaintiff can prove no set of facts which would support her claim that would [7] otherwise entitle her to relief. Under that imbalanced standard, this Court must accept all of the Plaintiff's allegations which have been set forth in the complaint as being true. It should be noted, parenthetically, that this Court believed that the *Elrod* and *Branti* cases to which references have been made are distinguishable from the instant case and, thus, the Court does not believe that they give any meaningful guidance to the Court for a resolution of the instant motion.

A second reason why, in the judgment of this Court, the Defendant's motion should be denied is that this

case appears to be quite different in that apparently none of the criticisms which were voiced by the Plaintiff were directed at Judge Brody. It has been asserted by the Plaintiff that Ms. Guercio only transmitted newspaper articles, which were presumptively critical of Judge Woods, to the committee who was investigating his then pending application. It has been asserted by the Defendant Brody that the Plaintiff had—strike that.

It has been asserted by the Defendant Brody that the then nominee Woods had expressed a view that he could not work with Judge Brody's office. It is unclear whether the comments were directed to Judge Brody, to his office staff, to Judge Brody and his office staff or [8] whomever.

It does appear facially that the Plaintiff's comments were directed to the entire Bankruptcy Court, as well as to the incoming nominee, George Woods. Thus, looking at the evidence in a light that is most favorable to the Plaintiff, it does not appear that her loyalty to Judge Brody had been impaired by the expression of her beliefs.

Moreover, the facts in this case bear a similarity, once again, to *Pickering*. The Court noted at page 570 that:

> "The statements are in no way directed toward any person with whom appellant would normally be in contact in the course of his daily work as a teacher . . . Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships which can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."

Clearly, the Plaintiff worked for Judge Brody on a daily basis and enjoyed the relationship that exists between a Judge and his secretary. But it does also [9] appear that the Plaintiff did not work for the Bankruptcy Court or for the then nominee, and later to become Bankruptcy Judge, George Woods, about whom she was quite critical.

And, finally, there is a question in the mind of this Court as to whether the fact that a potential judge is offended, with or without justification, is a sufficient basis for another judge to fire that staff member unless the potential judge or nominee would have to work very closely with that staff member. It does not appear that this is the case; and, thus, it would suggest to the Court that on the basis of the imbalanced standard, that the allegedly offensive actions which were taken by the Plaintiff are sufficient reason for another judge to terminate the services of the staff member. And as a postscript, this Court believes that, from the imbalanced standard, that there is a public interest in the alleged actions of the Plaintiff.

As noted earlier, that this court had suffered under a long and seemingly tortuous experience of the Bankruptcy Court, and, ostensibly, it was the effort of the Plaintiff to bring about an efficient, productive and scandal free court. Thus, the Court believes that —strike that. One other point should be mentioned.

For an action to be found to have violated [10] clearly established law, there is no requirement that actual cases involving exact actions in question be on the books. This Court has the responsibility to determine whether the allegations in the Plaintiff's complaint clearly violated established law at the time that the incidence [*sic*] took place.

It is the judgment of this Court that, when based upon an examination of the Plaintiff's complaint, and assuming those facts to be without contest, that her allegations are clearly sufficient. The Court noted in the *Connick* case, which was decided by the Supreme Court in 1983 that:

> "For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."

And, thus, the Court does conclude, as it stated at the outset of this opinion, that the Defendant Brody's motion to dismiss the *Bivens* and governmental immunity claims must be denied at this juncture. This Court, thus, denies them without prejudice at this time.

Are there any questions from either counsel with regard to the opinion of the Court? Mr. Mack and Mr. Sher?

[11] MR. SHER: I think your opinion is clear, Your Honor.

May we have 60 days' stay of discovery to consider appeal at this point?

THE COURT: I want to talk with you, since you are physically here, for a moment in chambers with you for a few minutes, and we can discuss that matter.

MR. SHER: Sure.

THE COURT: All right. We will stand in recess.

(Proceedings adjourned at 12:37 p.m.)

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No. 90-1027

In The

Supreme Court of the United States

October Term, 1990

HELEN JEAN GUERCIO,

Petitioner,

v.

GEORGE BRODY AND JOHN FEIKENS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE HONORABLE JOHN FEIKENS

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QUESTION PRESENTED

Whether the court of appeals correctly held the Honorable John Feikens entitled to dismissal as a matter of law on grounds of qualified immunity where, based on the well-pleaded, non-conclusory factual allegations of plaintiff Guercio's second amended complaint for wrongful termination, a reasonable judge in Judge Feikens' position could have concluded that authorizing Guercio's termination was an option that he could act upon without violating her constitutional rights.

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OPINIONS BELOW

The opinion of the court of appeals reversing the district court's order denying defendants' motions to dismiss (Pet. App. 3a-29a) is reported at 911 F.2d 1179 (6th Cir. 1990).

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1990. An order denying Guercio's petition for rehearing was entered on September 26, 1990. The petition for a writ of certiorari was filed on December 26,

1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Procedural History

Plaintiff's original complaint against George Brody, then a bankruptcy judge, and John Feikens, then Chief District Judge of the Federal District Court for the Eastern District of Michigan, was filed in October 1984; an amended complaint was filed in January 1985. The district court granted defendants' motion to dismiss on grounds of absolute judicial immunity on August 6, 1985.

After plaintiff appealed, the United States Court of Appeals for the Sixth Circuit reversed. *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987). The Sixth Circuit granted rehearing *en banc* solely as to Judge Feikens, *Guercio v. Brody*, 823 F.2d 166 (6th Cir. 1987), but then reversed itself *sua sponte* and reinstated its original decision. *Guercio v. Brody*, 859 F.2d 1232 (6th Cir. 1988). The order of remand to the district court stated that the district court was to give the case further consideration "in light of" *Forrester v. White*, 484 U.S. 219 (1988), an absolute immunity case.

Following remand, plaintiff filed a second amended complaint ("the complaint"), and both defendants moved to dismiss it. Judge Feikens' motion was on grounds of absolute and qualified immunity, in the alternative. Both motions were denied by the district court, which, pursuant to the Sixth Circuit's instructions, addressed both the absolute immunity issue under *Forrester* and the qualified immunity issue. Both defendants appealed, and the Sixth Circuit reversed, holding that: (1) "further consideration of absolute immunity is foreclosed by the *Forrester* rationale" that "judges are not entitled to absolute immunity from suit for actions arising out of personnel decisions," but that (2) based on the nonconclusory allegations of the complaint, both judges are entitled to

qualified immunity. *Guercio v. Brody*, 911 F.2d 1179, 1182 n.2 & 1189 (6th Cir. 1990); Pet. App. 7a & 22a.

B. Facts

In holding that Judge Feikens' motion for dismissal should have been granted, the Sixth Circuit reviewed the nonconclusory factual allegations of Guercio's complaint to determine whether, at the time Guercio was terminated, judges of reasonable competence in the position of Judge Feikens could have disagreed on whether terminating Guercio was an option that could be acted upon without violating her constitutional rights.

Guercio, who was Judge Brody's personal and confidential secretary, alleges in her complaint that, in October 1981, she was terminated by her immediate superior, Bankruptcy Judge George Brody, in violation of her constitutional rights. She made the same claim against then Chief District Judge John Feikens, who approved the termination pursuant to authority granted to him by the Sixth Circuit Judicial Council and the District Court for the Eastern District of Michigan.

Guercio's complaint alleges that, beginning in October 1979, two years prior to her termination, she became aware of a serious pattern of official misconduct in the Bankruptcy Court for the Eastern District of Michigan. At this time, the Bankruptcy Court was comprised of four judicial positions, three of them in Detroit. The Detroit Division of the Bankruptcy Court therefore included only three judges, their personal staffs, the Clerk of the Bankruptcy Court, and his staff. The repercussions of the disclosures of misconduct included:

(1) the indictment, in or about May 1981, of the Chief Clerk of the Bankruptcy Court on federal charges based on malfeasance and conflict of interest in the performance of his duties;

(2) the recommendation, in June 1981, of a Merit Screening Committee against the reappointment of a sitting bankruptcy judge, which finding was accepted in a report by the Chief Judge of the Sixth Circuit, leading to the bankruptcy judge's resignation (copies of the Merit Screening Committee report and the Chief Judge's report are Appendices A and B hereto, respectively);

(3) the indictment, in 1982, of a prominent bankruptcy attorney and a bankruptcy court clerk on federal charges of conspiracy to defraud, obstruction of justice, receipt of gratuities, and bankruptcy fraud; and

(4) the subsequent convictions of the Chief Clerk, the bankruptcy attorney, and the bankruptcy court clerk on the offenses charged.

As the pattern of misconduct involving the bankruptcy court began to unfold, the Sixth Circuit Judicial Council took action. In a May 6, 1981, order (hereinafter referred to as the "Judicial Council's order"), signed by the Chief Judge of the Sixth Circuit, and captioned "In the matter of: Clerk of the Bankruptcy Court Eastern District of Michigan," the Council stated:

> By a companion order entered today the Council has directed that William Harper be suspended from the performance of his duties as Clerk of the Bankruptcy Court for the Eastern District of Michigan and that he be placed on administrative leave with pay pending the disposition of the indictment returned against him by a grand jury in the Eastern District of Michigan charging a violation of 19 U.S.C. 154, prohibited purchase from the estate of bankrupt.
>
> The Council concludes that the effective and expeditious Administration of the business of the courts within this circuit requires that the administration of the Bankruptcy Court for the

> Eastern District of Michigan be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision should include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the *approval of all personnel actions affecting employees of the Bankruptcy Court.*
>
> It is therefore ordered that, until further order of this Council, the administration of the Bankruptcy Court for the Eastern District of Michigan shall be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision shall include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court *and the approval of all personnel actions affecting employees of the Bankruptcy Court.* (emphasis added).

A copy of the Judicial Council's order is Appendix C hereto.

The district court's response to the Judicial Council's order was an order, dated May 18, 1981, signed by all of the district judges of the Eastern District of Michigan, except Chief Judge Feikens. The order quoted the final paragraph of the Judicial Council's order, and recited:

> The Judicial Council of the United States Court of Appeals for the Sixth Circuit having entered an order on May 6, 1981 . . . .
>
> It is ordered, effective May 6, 1981, that John Feikens, the Chief Judge of this Court, be, and he is hereby, authorized to implement the provisions of the order of the Judicial Council above stated.

A copy of the district court's order is Appendix D hereto.

According to the complaint, between December 1979 and May 1981, Guercio provided information on certain unlawful practices in the bankruptcy court to the authorities. (Pet. App. 71a-73a; complaint, ¶¶ 10-15). Guercio

does not allege that any disciplinary action was taken against her for this activity; nor does she allege that either Judge Brody or Judge Feikens expressed any criticism of her as a result of these actions.

Plaintiff was discharged by Judge Brody in October 1981. The complaint alleges that Guercio, upon learning the identity of the nominee to replace the bankruptcy judge who had resigned earlier that year, had obtained copies of newspaper articles critical of that nominee, the Honorable George E. Woods (now a United States District Court Judge), and mailed the articles anonymously to local newspapers as well as to the Federal Bureau of Investigation, the Administrative Office of the United States Courts, a judicial nominating committee, and the United States Attorney's office. (Pet. App. 73a-74a; complaint, ¶¶ 18-20). Woods allegedly responded by refusing to work with Brody unless Guercio was terminated. After taking the issue to Feikens, who approved the decision to terminate Guercio in his capacity as administrator of the bankruptcy court, pursuant to the Judicial Council's order, Brody terminated Guercio's employment. (Pet. App. 74a; complaint ¶¶ 21-23).

C. The Court of Appeals' Decision

The court of appeals first addressed Judge Feikens' argument that his action approving Guercio's termination pursuant to the order of the Sixth Circuit Judicial Council was a judicial act, protected by absolute judicial immunity. Reviewing the history of the Sixth Circuit's own earlier actions in this case, the court noted that a panel of the Sixth Circuit had, in 1987, reversed the district court's decision according absolute immunity to both judges. Soon thereafter, the full court voted to grant rehearing *en banc* as to Judge Feikens alone. After this Court's decision in *Forrester v. White*, 484 U.S. 219 (1988), however, the court reversed itself:

> In response to *Forrester*, this circuit vacated its order granting rehearing en banc, reinstated its previous mandate . . . relative to Judge Feikens, and remanded the entire matter to the district court in order to "consider the entire case in light of the Supreme Court's decision in *Forrester v. White* and consider the remaining issues in light of *Forrester v. White* and this court's reinstated decision of April 1, 1987."

911 F.2d at 1182; Pet. App. 7a.

Recognizing that, because *Forrester* dealt exclusively with the issue of absolute immunity, the remand order appeared to require the district court to reconsider the absolute immunity issue on the merits,[1] the court of appeals offered the following explanation of the intent behind its remand order:

> While the language of this last mandate would seem to suggest that the district court on remand was to reevaluate the propriety of granting *absolute* immunity in light of *Forrester v. White*, it is difficult to reconcile that suggestion with the court's "reinstatement" of its first opinion in *Guercio I*, which unequivocally denied the availability of absolute immunity for the act in question. The panel's decision in *Guercio I* is the law of this case, and both judges were, accordingly, foreclosed from asserting absolute judicial immunity as a defense against Guercio's charges in future proceedings.

---

[1] While raising the possibility that the court of appeals' reinstated 1987 decision on absolute immunity was the law of the case on remand, Pet. App. 40a n.15, the district court did, as the court of appeals' 1988 order instructed, reconsider Judge Feikens' entitlement to absolute immunity in light of *Forrester*. Pet. App. 31a-32a.

911 F.2d at 1182; Pet. App. 7a. In a footnote to this paragraph, the Sixth Circuit stated:

> The possibility that this court desired the district court to reconsider the absolute immunity issue in light of *Forrester* is belied to a large degree by *Forrester*'s unequivocal holding that judges are not entitled to absolute immunity from suit for actions arising out of personnel decisions. *Forrester*, 484 U.S. at 229-30, 108 S.Ct. at 545-46. Thus, although the language of the court's mandate in *Guercio I* is unclear, further consideration of absolute immunity is foreclosed by the *Forrester* rationale.

Id. In effect, both the district court and the court of appeals took the view that, because Judge Feikens' action with respect to Guercio's termination can be characterized as a "personnel decision," *Forrester* dictates that absolute immunity is unavailable. This superficial analysis entirely overlooks the fact that Judge Feikens was acting pursuant to extraordinary powers conferred by the Judicial Council's order, which called upon him to restore public trust in a court system which had been wracked by scandal. In so acting, he made a decision pursuant to judicial authority which should be accorded absolute immunity under *Forrester*. Because Judge Feikens is entitled to absolute immunity, the result reached by the court of appeals is correct, even if that court's qualified immunity analysis is flawed in any way.

The court of appeals' decision, however, represents a straightforward application of the principles of qualified immunity derived from "the seminal case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)." *Guercio v. Brody*, 911 F.2d 1179, 1182 (1990); Pet. App. 8a. Under those principles, the sole issue raised by defendants' motions to dismiss the complaint was:

> whether plaintiff's rights were so clearly established when she was terminated that Judge

> Feikens should have understood that his conduct at the time he ordered her discharge violated her first amendment right to free speech – a question of law to be decided by the court. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct 3034, 3038 (1987); *Garvie v. Jackson*, 845 F.2d at 649; *Ramirez v. Webb*, 835 F.2d at 1156.

911 F.2d at 1183; Pet. App. 9a. The right of public employees to speak out on matters of public concern was generally established by *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), which, the court of appeals, noted, held that:

> [A] public employee's interest in commenting on matters of public concern is protected by the first amendment only insofar as it is of greater weight than the employer's interest in "promoting the efficiency of the public services it performs through its employees."

Id.; Pet. App. 10a. Thus, on a motion to dismiss on qualified immunity grounds:

> [I]t is the responsibility of the court to determine if the law was so clearly established at the time of the incident that a reasonably competent public official should have known that a course of action would be inconsistent with a public employee's rights as defined in *Pickering*.

Id.; Pet. App. 10a.

Accordingly, the court of appeals proceeded by placing the "totality of the well-pleaded, nonconclusory allegations of the complaint on the *Pickering* scale," *id.*, to determine whether "Guercio's rights on the *Pickering* scale, as opposed to whether the general teachings of *Pickering*, were so clear at the time in question that reasonable minds could not differ on the constitutionality of her discharge." *Id.* at 1184; Pet. App. 11a. In other words, the issue was:

> whether Guercio's first amendment rights to free speech were so evident from pre-existing

> law (*viz., Pickering*) when she was ordered discharged by Judge Feikens that, measured objectively, he was under an *affirmative duty to refrain from such conduct. Harlow v. Fitzgerald*, 457 U.S. at 818; *Anderson v. Creighton*, 107 S.Ct. at 3038; *Ohio Civil Service Employees' Ass'n v. Seiter*, 858 F.2d 1171, 1173 (6th Cir. 1988).

Id. (emphasis added).

In so framing the issue, the court of appeals rejected the district court's approach as too "abstract," because it "failed to apply the qualified immunity test *to the facts and circumstances of this case.*" *Id.*; Pet. App. 11a (emphasis in original).

> In sum, the district court's approach failed to apply the *Harlow* test, which in the first instance required a determination of whether a clearly established right was alleged to have been violated, and secondly, a determination of whether a reasonable public official should have known that the conduct at issue was undertaken in violation of that right. As a consequence of its misdirection, the district court erroneously decided the defendant's qualified immunity motion to dismiss without applying the test that had been mandated by the Supreme Court and this circuit . . . .

Id.; Pet. App. 12a. Under well-established precedent, the court of appeals stated,

> [t]he standard to be applied in resolving the "clearly established law" predicate within the *Harlow* touchstone of "objective legal reasonableness" is defined in *Halley v. Briggs* with clarity: *"if officers of reasonable competence could disagree on this issue, immunity should be recognized."* 475 U.S. at 341, 106 S.Ct. at 1096 (emphasis added). The qualified immunity test thus is not as stringent as the district court's disposition would imply, affording as it does

> "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.*

Id. at 1185; Pet. App. 13a.

"In light of *Pickering*, and mindful of the appropriate qualified immunity test as defined in *Harlow*," the court of appeals considered "the continuous course of Guercio's conduct between December, 1979 and October, 1981, when she was discharged as recited in the complaint," and asked whether:

> judges of reasonable competence in the position of Judge Feikens at the time here in issue could have disagreed upon whether her right to exercise her first amendment right to free speech without being terminated from her employment was outweighed by the public interest in restoring morale, cooperation, dignity, public respect, and confidence to the United States Bankruptcy Court for the Eastern District of Michigan, a court which had been corroded by corruption and favoritism.

Id. at 1185; Pet. App. 14a.

Observing that the 1984 amendments to the Bankruptcy Code changed the relationship of the bankruptcy court and its judges within the judicial scheme, the court of appeals took judicial notice of the "interdependent working relationship that existed between the bankruptcy and district courts and the judges thereof during 1981 when plaintiff's discharge occurred." *Id.*; Pet. App. 14a. Given this general "historical condition," and also

> mindful of the more particularized circumstances arising out of Judge Feikens's specially delegated responsibility pursuant to the mandate of the Sixth Circuit Judicial Council to restore morale, cooperation, public confidence, and efficient operation in the bankruptcy court,

the court of appeals recognized that, under the circumstances present here, "the potential for internecine conflict in the court was palpable." *Id.* at 1186; Pet. App. 15a.

Accepting as true the nonconclusory allegations of the complaint, the court of appeals noted:

> [I]t appears that Guercio's initiative – launched in 1979 – became, over a period of time, productive in notifying the District Court for the Eastern District of Michigan of improprieties that implicated both unethical and criminal conduct within the Detroit Bankruptcy Court.

Id.; Pet. App. 16a. Based on nothing other that Guercio's role in sparking a criminal investigation and subsequent successful prosecutions, the court of appeals concluded, "judges of reasonable competence could not but have believed that Guercio's job security was protected by the first amendment as interpreted in *Pickering*." *Id.*; Pet. App. 16a.

Up to that point, however, as the court of appeals noted, Guercio was "neither admonished for nor discouraged from pursuing her activities." *Id.*; Pet. App. 16a. Though the Judicial Council of the Sixth Circuit had placed the bankruptcy court in "virtual receivership" and issued a mandate, delegated to Judge Feikens, to rehabilitate that court and assume responsibility for approving "all personnel actions affecting employees of the Bankruptcy Court," no adverse actions of any kind against Guercio are alleged to have occurred until after her action of circulating dated news accounts critical of nominee Woods. *Id.*; Pet. App. 16a.

Carefully reviewing the complaint's allegations with respect to the latter incident, the court of appeals noted that:

> [T]he dated news accounts critical of Woods were circulated after a committee of federal district judges of the Eastern District of Michigan had nominated him to replace Hackett as a bankruptcy judge, after his background and qualifications had been investigated, and after his nomination had been endorsed by a screening committee of three Michigan attorneys. In

> sum, the nominative and appointive procedures, including the required investigations, had been exhausted to completion when petitioner released the dated news accounts, which had been in the public domain for approximately eleven years. The circulation was not accompanied by any newly discovered disclosures of concealed past or current misdeeds or wrongdoing relative to the substance of the circulated news accounts critical of Woods. Guercio did not attest to the truthfulness or accuracy of the circulated news accounts nor did she directly express an opinion as to the integrity, honesty, ability, or other qualifications of Woods to serve as a bankruptcy judge.

Id. at 1187-88; Pet. App. 19a.

In light of the "disruptive implications of the turmoil" in the Detroit Division of the Bankruptcy Court; the "delegated mandate" of the Sixth Circuit Judicial Council, directing the restoration of public confidence and efficient operation of the court "by, among other actions, expeditiously appointing a judge to the vacancy created by the resignation of Judge Hackett"; "the disharmony precipitated by petitioner's distribution of dated news articles"; and the "incipient confrontation manifested by the bitter resentment Woods displayed when he advised Judge Brody that he would, if appointed, refuse to work with Brody unless Guercio's employment were terminated," *id.* at 1188; Pet. App. 19a-20a, the court of appeals concluded that a competent judge in the position of Judge Feikens could have reasonably:

> 1. questioned if the circulation of the dated news accounts constituted an expression of speech protected by the first amendment;
>
> 2. concluded that petitioner's expressions and actions concerning Woods served to frustrate the implementation of the Sixth Circuit Judicial Council's delegated mandate to restore public confidence in the Detroit Bankruptcy

court because they discredited and embarrassed the appointive procedure and raised the genuine spectre of conflict between judges of the court;

3. concluded that Guercio's expression and activities had become a force counter-productive and disruptive to the ongoing effort to rehabilitate and revitalize the operation of the Detroit Bankruptcy Court; and

4. concluded that Guercio was no longer speaking out on matters of public interest, but rather had begun to speak as an employee on matters primarily of personal concern.

Id.; Pet. App. 20a-21a (footnote omitted).

Thus, the court of appeals concluded:

In this court's considered opinion, accepting the totality of plaintiff's well-pleaded allegations as true, judges of reasonable competence in the position of Judge Feikens at the time here in controversy, measured objectively, could have disagreed as to:

1. whether and to what extent Guercio's speech was on a matter of public concern, entitling her to claim the protection of the first amendment; and

2. where the *Pickering* scale, with all of the parties' competing interests in the balance, would ultimately come to rest.

Id. at 1189; Pet. App. 20a-21a. Consequently, the court of appeals concluded:

Guercio's right to protection under the first amendment was not so clearly established at the time that Feikens ordered her termination that any judge of reasonable competence in the position of Judge Feikens, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.

Id.; Pet. App. 22a.

For these reasons, the court of appeals held that both Judge Feikens and Judge Brody are entitled to qualified immunity. Accordingly, the district court's denial of their motions to dismiss the complaint was reversed and the case remanded with instructions to vacate the rulings below and dismiss the plaintiff's causes of action insofar as they seek recovery of monetary damages from Brody and Feikens in their individual capacities. *Id.*; Pet. App. 22a.

ARGUMENT

I. THE DECISION BELOW CORRECTLY APPLIES WELL-ESTABLISHED LAW ON QUALIFIED IMMUNITY THAT NEED NOT BE REVIEWED HERE.

The court of appeals' decision applies well-established and squarely applicable decisions of this Court with respect to qualified immunity, including *Anderson v. Creighton*, 483 U.S. 635 (1987); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and the balancing test mandated in *Pickering v. Board of Education*, 391 U.S. 563 (1968), for determining the constitutionality of the termination of public employees who claim they have been terminated in retaliation for the exercise of first amendment rights. In accordance with the principles set forth in these cases, the court of appeals determined, as a matter of law, that:

> Guercio's right to protection under the first amendment was not so clearly established at the time that Feikens ordered her termination that any judge of reasonable competence in the position of Judge Feikens, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.

Guercio v. Brody, 911 F.2d 1179, 1189 (1990); Pet. App. 22a. Thus, based on the unique facts of this case, as alleged by

plaintiff, Judge Feikens is entitled to the protection of qualified immunity and "is entitled to dismissal before the commencement of discovery." *Id.* at n.7 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

Because Guercio cannot plausibly maintain that the decision of the court of appeals is inconsistent with the established precedents of this court or in conflict with any decision of another court of appeals, her Petition resorts instead to innuendo and implication. For example, Guercio argues that this decision must be reviewed because the effect of the court of appeals' decision is to dismiss an "unanswered complaint." Pet. at 8. The express purpose of qualified immunity, however, is "to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). It is for this reason that "qualified immunity represents the norm" for high government officials. *Id.* In reaffirming this principle, this Court has expressly held that a defendant is "entitled to dismissal prior to discovery" if the actions alleged "are actions that a reasonable officer could have believed lawful." *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). In fact, it is plaintiff who benefits from the presumption of truth accorded to all non-conclusory allegations of the complaint on this motion to dismiss, and therefore Guercio has no reason to object that the complaint is "unanswered."

Similarly, by frequent reference to the backdrop of bankruptcy court corruption against which the events alleged in the complaint took place, Guercio apparently seeks to imply that Judge Feikens – the very man who was responsible for restoring the integrity of the bankruptcy court – was motivated by something other than the mandate set forth in the Judicial Council's order to restore public confidence in a court wracked by scandal.

In fact, however, there are no allegations in the complaint that would support that implication, and the complaint alleges, to the contrary, that it was Judge Feikens who ordered the investigation which resulted in the resignation of a bankruptcy court judge and the conviction of several individuals implicated in the corruption. Pet. App. 72a; complaint ¶ 13. The only basis for implying that Judge Feikens was even insufficiently zealous in opposing that corruption is the allegation, in paragraphs 10-12 of the complaint (Pet. App. 71a-72a), that he did not immediately order an investigation when Guercio first telephoned to inform him of problems she had perceived.

Finally, there is no basis other than supposition for Guercio's conclusory assertion that, in terminating her, defendants sought somehow to punish her for her role as a "whistleblower." Nor is there even an allegation that Judge Feikens acted to protect his own personal interests or reputation. Rather, the gravamen of Guercio's complaint is that Judge Feikens was too zealous to preserve the integrity and unity of the court he had been specially appointed to oversee (which court had a pressing need for a new judge to replace the one who had resigned under a cloud), and too solicitous of the wishes of an all-but-confirmed nominee to that court, who allegedly took offense at Guercio's apparent attempt to embarrass his confirmation process. As the court of appeals recognized, acting to terminate Guercio before she had taken the step of circulating dated newspaper articles critical of the new nominee might have given rise to a violation of her first amendment rights. *See* 911 F.2d at 1186; Pet. App. 16a. No such action was taken at that time, however; nor was any disciplinary action taken at that time; nor has Guercio alleged that either defendant ever so much as spoke a critical word to her with respect to her "whistleblowing" activities. On the contrary, it was only after her subsequent circulation of the articles that her termination took place.

Despite the implications and inuendo in the Petition, the decision in the court below raises no new legal issues, does not conflict with prior decisions of this Court or of other circuits, and is fundamentally sound. In short, the decision below presents no basis for review by this Court.

II. THIS COURT SHOULD NOT REVISIT THE COURT OF APPEALS' ASSESSMENT OF THE FACTS ALLEGED IN THE COMPLAINT.

A. The Court of Appeals Correctly Held that a Reasonable Judge in Judge Feikens' Position Could Have Acted as He Did.

Application of the qualified immunity test required the court of appeals to determine whether the plaintiff's rights were so clearly established at the time of the events alleged in her complaint that a reasonably competent judge must have known that terminating her would violate her constitutional rights. Thus, under the applicable law, as set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and based on the facts alleged in the complaint, the court of appeals had to assess whether, in 1981, a judge in Judge Feikens' position could have believed that the circulation of dated news accounts by Guercio was not protected speech under the first amendment, or could have believed that institutional concerns, such as the potential for disruption of the ongoing effort to rehabilitate the bankruptcy court in Detroit, outweighed Guercio's right to act as she did. Two experienced judges of the court of appeals, after a careful assessment of the allegations, concluded that a reasonable judge could have reached either conclusion, and therefore it cannot be said that Judge Feikens was "under an affirmative duty to have refrained" from terminating Guercio. 911 F.2d at 1189; Pet. App. 22a. A third judge, while dissenting, did so reluctantly, apparently because he thought the qualified immunity issue should have been resolved on a motion for summary judgment, in that "the motion to

dismiss requires us to take as true conclusory allegations in the amended complaint that may be inconsistent with other factual predicates in the complaint and with the historical record of what actually happened in the bankruptcy court. . . . " 911 F.2d at 1190-91; Pet. App. 26a-27a. The dissent cites no authority for its position that conclusory allegations that contradict specific factual allegations must be presumed true on a motion to dismiss based on qualified immunity.

Guercio's bald statement that "[n]o reasonable federal judge could question whether such speech was an expression of speech protected by the First Amendment," Pet. at 9, and that "no reasonable judge" would have terminated Guercio under the circumstances present here, Pet. at 10, flies in the face of the fact that two federal judges have joined in an opinion that contradicts her sweeping pronouncements. And when Guercio offers advice on how Judge Feikens might better have handled this crisis, Pet. at 10, she offers information of no possible relevance to the question decided by the court of appeals. The question is not whether Judge Feikens' action was the wisest possible action under the circumstances, but whether, under the facts alleged, any reasonable judge would have known that he or she was foreclosed from taking action against Guercio, because terminating her would *necessarily* violate her constitutional rights. As the court of appeals' meticulous opinion shows, a reasonable judge would not necessarily have come to that conclusion, and Judge Feikens is therefore entitled to qualified immunity as a matter of law.

B. The Court of Appeals Correctly Relied in Its Assessment Upon Only the Well-Pleaded, Non-Conclusory Allegations in the Complaint.

Apart from rhetoric, the substantive portion of the Petition consists of a series of quibbles addressed to the court of appeals' handling of the factual allegations of the

complaint. For example, in addition to alleging that her distribution of articles critical of Judge Woods had sown seeds of dissension between nominee Woods and Judge Brody, and that the ensuing dispute had been taken to the Chief Judge for resolution, the complaint also states, in contradiction to the above, that her action had caused "no disruption" in the court. *See* Pet. at 12. The court of appeals resolved this contradiction by limiting its analysis to "the totality of the well-pleaded, non-conclusory allegations of the complaint." 911 F.2d at 1183.

In so doing, the court of appeals was conforming its analysis to that prescribed by *Anderson v. Creighton*, 483 U.S. 635 (1987), which made it clear that, even though a constitutional right may be "clearly established" as a general proposition, a relatively particularized pleading of constitutional violation is necessary to withstand a motion for dismissal on grounds of qualified immunity. In *Anderson*, this Court held that the Court of Appeals erred in holding the defendant FBI agent was not entitled to dismissal on qualified immunity grounds simply because a general right not to be subjected to warrantless searches without probable cause or exigent circumstances was clearly established at the time.

The courts of appeals have followed *Anderson* in reversing the denial of dismissal on qualified immunity grounds where the plaintiff relied upon conclusory allegations of constitutional violation. *See, e.g., Gutierrez v. Municipal Court*, 838 F.2d 1031, 1051 (9th Cir. 1988); *Martin v. Malhoyt*, 830 F.2d 237, 255 (D.C. Cir. 1987); *Myers v. Morris*, 810 F.2d 1437, 1457 (8th Cir. 1987). *See also Geter v. Fortenberry*, 849 F.2d 1550, 1557 (5th Cir. 1988) ("Allowing [plaintiff] further discovery would amount to condoning a fishing expedition and would undermine the policies behind the immunity defense."); *Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987) (vacating the denial of a motion to dismiss on qualified immunity grounds

because the trial court placed the burden on the defendant to show entitlement to qualified immunity, and noting that plaintiff should plead "in the original complaint all of the factual allegations necessary to sustain a conclusion that defendant violated clearly established law."); *Brown v. Texas A&M Univ.*, 804 F.2d 327, 333 (5th Cir. 1986) ("[P]laintiff must plead specific facts with sufficient particularity to meet all the elements necessary to lay a foundation for recovery, *including those necessary to negative the defense of qualified immunity.*" (emphasis added)). Accordingly, the court of appeals here was under no obligation to accept as true conclusory allegations of "no disruption" that actually contradicted other specific factual allegations in the complaint.

Here, the court of appeals based its conclusions upon judicially noticeable facts (such as those contained in the appendices to this brief) and the well-pleaded, non-conclusory allegations of the complaint (including those detailing Judge Feikens' involvement in the investigation, "which Judge Feikens requested and endorsed, and in which he actively participated along with the plaintiff and other authorities within the limits of his office," 911 F.2d at 1186; Pet. App. 16a). The court also observed that Judge Feikens' "desire to prevent [internecine] conflict was both genuine and compelling." *Id.* "Nothing in the record," Guercio objects, "evidences Judge Feikens' subjective desires." Pet. at 13. Whether or not Judge Feikens' subjective concerns may legitimately be inferred from the record, however, is of no consequence. Subjective intent is legally irrelevant under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and was not taken into account in the court of appeals' objective assessment of the facts of this case. In summarizing what a "competent judge in the position of Judge Feikens" could reasonably have concluded under the circumstances alleged here, for example, 911 F.2d at 1188; Pet. App. 20a-21a, the court of appeals completely

disregards any conclusions about Judge Feikens' subjective intentions or desires, instead applying the objective test required by *Harlow*. Guercio's reliance upon the court's passing reference to Judge Feikens' subjective intent is altogether misplaced.

C. The Petition's Quibbles with the Phrasing Employed in the Court of Appeals' Opinion Present No Basis for Review by this Court.

At pages 14-16 of the Petition, Guercio seems to argue that this Court must review the court of appeals' decision in order to correct that Court's inartful phrasing. The Petition fails to show that this inartful phrasing, however, gave rise to any substantive or procedural error.

For example, Guercio takes issue with the court of appeals' statement, based upon paragraphs 17-20 of the complaint, that "the nominative and appointive procedures, including the required investigations, had been exhausted to completion when Guercio released the dated news accounts." Pet. at 14. Guercio apparently infers that the court of appeals meant by this that Guercio's action came too late to have any effect upon the process, and takes umbrage at the locution. In fact, the court of appeals does not state or assume that the nominee had already been confirmed at the time. The court simply summarizes the allegations of the complaint, to the effect that Woods had already been nominated by a committee of judges and approved by a screening committee of attorneys. The complaint does not allege that Guercio's action sought to contribute to either the nominative or the appointive processes, but instead presents this action as coming later, after these initial steps, which ordinarily delve quite deeply into the candidate's background, had been completed.

It is true that the record does not reveal whether or not the information contained in the news accounts had

been reviewed by the responsible committees or not. Guercio's apparent inference that the court of appeals assumed the committees had reviewed this information, however, is without basis. A careful reading of the court of appeals' summary of paragraphs 17-27 of the complaint, 911 F.2d at 1187-88; Pet. App. 19a, reveals that the Court accurately assesses just what the complaint does – and does not – allege with respect to the nomination and Guercio's actions in relation to it.

Finally, Guercio takes issue with the court of appeals' statement that Judge Feikens and the Administrative Office "initially withheld formal action on Guercio's original submissions." 911 F.2d 1186; Pet. App. 16a. This is misleading, Guercio contends, because it "robs" her of a "permissible inference," that Judge Feikens in fact did *nothing*, and did nothing because – Guercio implies, but does not suggest outright – he was motivated by something other than the mandate set forth in the Judicial Council's order to restore public confidence in a court wracked by scandal. There is, however, no basis for such an inference from the well-pled factual allegations of the complaint. Indeed, the complaint alleges that Judge Feikens ultimately ordered the investigation that led to the formal action taken against those involved in acts of corruption.

Guercio uses the same tactics of inuendo and implication in her effort to find fault with the court of appeals' reasoning. The court of appeals, however, carried out an earnest, meticulous application of the rules of qualified immunity set forth in this Court's decisions, and the resulting decision is devoid of legal error. Accordingly, the court of appeals' decision need not be reviewed by this Court.

III. THE RESULT REACHED BY THE COURT OF APPEALS ALSO IS WARRANTED ON ABSOLUTE IMMUNITY GROUNDS UNDER *FORRESTER*.

Because Judge Feikens also is entitled to absolute immunity, the result reached by the court of appeals is correct, even if its treatment of the qualified immunity issue was erroneous in some respect.[2] The court of appeals held that Judge Feikens is not entitled to absolute

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[2] In the Sixth Circuit's first opinion in this case, *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987), that court rejected defendants' absolute immunity defense, relying upon *Stump v. Sparkman*, 435 U.S. 349 (1978). After granting rehearing as to Judge Feikens, *Guercio v. Brody*, 823 F.2d 166 (6th Cir. 1987), the Court reinstated its original decision, *Guercio v. Brody*, 859 F.2d 1232 (6th Cir. 1988), but remanded to the district court for further consideration in light of this Court's more recent decision on absolute judicial immunity, *Forrester v. White*, 484 U.S. 219 (1988). The district court on remand again held that Judge Feikens is not entitled to absolute immunity, this time applying the analysis of *Forrester* to the second amended complaint filed after remand, while expressing some doubt as to whether this Court's denial of absolute immunity was not already the law of the case. (Pet. App. 31a-32a & n.15). On appeal, Judge Feikens again argued that he is entitled to absolute immunity under *Forrester*, and the Sixth Circuit's 1990 decision suggested that, despite the wording of its remand order, the 1987 decision should have been deemed the law of the case on the absolute immunity issue. Nonetheless, the Sixth Circuit went on to state that, on the merits, "further consideration of absolute immunity is foreclosed by the *Forrester* rationale" that "judges are not entitled to absolute immunity from suit for actions arising out of personnel decisions." *Guercio v. Brody*, 911 F.2d 1179, 1182 n.2 (6th Cir. 1990); Pet. App. 7a. Because the Sixth Circuit's order of remand left this issue open, and both the district court and the court of appeals then proceeded to address Judge Feikens' absolute immunity arguments on the merits in light of the second amended complaint filed after remand, this issue is still subject to review on the merits by this Court.

immunity under the rationale of *Forrester v. White*, 484 U.S. 219 (1988), that "judges are not entitled to absolute immunity from suit for actions arising out of personnel decisions." *Guercio v. Brody*, 911 F.2d 1179, 1182 n.2 (6th Cir. 1990); Pet. App. 7a. The *Forrester* case, however, unlike the instant case, was essentially a case about an ordinary "personnel decision." Here, however, a personnel decision was made pursuant to extraordinary judicial powers delegated to address an unusual and severe threat to the integrity of a United States bankruptcy court. Thus, the outcome in *Forrester* does not mean that Judge Feikens should not be accorded absolute judicial immunity for his role in Guercio's termination.

In *Forrester*, this Court considered the question of whether a state court judge had absolute immunity from a suit for damages under 42 U.S.C. § 1983 for a decision to dismiss a probation officer. The judge had authority under state law to hire and fire probation officers at will. The plaintiff, however, alleged that she had been dismissed on account of her sex, and a jury awarded her damages on that basis. Subsequently, the district court set aside the verdict and granted summary judgment on the grounds of absolute judicial immunity. A divided panel of the Seventh Circuit affirmed the summary judgment. *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986).

This Court reversed, reaffirming the "functional approach" to immunity questions exemplified in *Stump v. Sparkman*, 435 U.S. 349 (1978):

> When applied to the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court, the doctrine of absolute judicial immunity has not been particularly controversial. Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, *immunity is justified and defined by the*

> *functions it protects and serves*, not by the person to whom it attaches.
>
> This Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity. The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform.

484 U.S. at 227 (emphasis added).

In deciding that the judge in *Forrester* was "acting in an administrative capacity" when he discharged the plaintiff, 484 U.S. at 229, and therefore was not entitled to absolute immunity, this Court did not depart from previous precedent. This Court did suggest, however, that an appropriate means of delineating what is functionally a "judicial act" is to consider whether one's criterion for judicial immunity "serves to distinguish judges from other public officials who hire and fire subordinates." 484 U.S. at 229-30. Thus, because the key criterion employed by the Seventh Circuit – essentially, whether concern over the threat of litigation would impair the quality of the judge's decisions regarding personnel matters – could also be applied to justify absolute immunity for executive officials, and because absolute immunity is not available to executive officials under like circumstances, it was held that absolute judicial immunity was not available to the state court judge who terminated his probation officer.

The present case is factually distinguishable from *Forrester*. Ms. Guercio was not Judge Feikens' subordinate. Judge Feikens' role in approving Judge Brody's decision to terminate plaintiff Guercio was thrust upon him by an order of the Judicial Council under 28 U.S.C.

§ 332(d)(1)[3] and an order of the district court. Section 332(d) provides for the delegation of broad authority by the Judicial Council to judges who assume, by this delegation, a mandatory duty to exercise discretionary authority to achieve the remedial goals of the Judicial Council. Section 332(d)(1) provides that "Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." The next subsection of the statute provides: "All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council." 28 U.S.C. § 332(d)(2).

The Judicial Council's order imposed responsibility for the operations of the bankruptcy court, including "approval of all personnel actions affecting employees of the Bankruptcy Court," upon the United States District Court. A second order signed by all of the other judges of the United States District Court for the Eastern District of Michigan delegated that responsibility to then Chief

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[3] 28 U.S.C. § 332(d) provides:

(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof.

(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.

Judge Feikens. See Appendices C and D hereto. Thus, *Forrester* does not mandate the denial of absolute immunity in the present case. Moreover, the authority conferred by the Judicial Council's and the district court's orders on Judge Feikens was of a kind that, under the *Forrester* test, one cannot imagine being exercised by anyone except a judge. Although the investigatory and remedial powers given to judicial councils by section 332(d)(1) are not well-defined, they surely are in part judicial or quasi-judicial; indeed, the necessity and legitimacy of the quasi-judicial powers conferred by this provision have been acknowledged by the courts. For example, the Eleventh Circuit has upheld the subpoena power of Judicial Councils under 28 U.S.C. § 332(d)(1). *In re Certain Complaints under Investigation by an Investigating Committee of the Judicial Council*, 783 F.2d 1488 (11th Cir. 1986).

The clear purpose of the Judicial Council's order in the present case was to take steps to restore public trust in a court system which had been wracked by scandal. If the Judicial Council simply had wished to see that sound personnel decisions were being made within that court system, it could have appointed a person experienced in judicial administration for this task, and conserved the district's judicial resources for judicial labors. The decision to place the bankruptcy court in a virtual receivership, giving the district court authority to oversee all matters bearing upon the effective administrative of justice in that court, was an extraordinary measure, but one clearly warranted by events surrounding the issuance of the Order. See Appendices A and B hereto.

The remedy imposed upon the bankruptcy court by the Judicial Council's order created unique demands upon Judge Feikens' judicial expertise, far removed from the sometimes stressful, yet more commonplace, demands imposed upon all those called upon to make personnel decisions. The broad range of criteria relevant to restoring public trust in a court system cannot be

equated with those ordinarily applied to review a personnel decision. The action taken by Judge Feikens in approving plaintiff Guercio's termination was not a typical judicial decision, but neither was it a typical personnel decision. Equating it with the action taken by the judge in *Forrester* would both expand the holding in that case and denigrate the role thrust upon Judge Feikens by the Judicial Council in this one.[4]

The act for which Guercio seeks damages from Judge Feikens was a judicial act, subject to absolute judicial immunity. This conclusion derives from the "functional approach" to absolute judicial immunity set forth in *Stump v. Sparkman* and reaffirmed by *Forrester*. The Judicial Council delegated judicial authority by its Order, and the exercise of that authority required Judge Feikens to function as a judge in balancing individual interests against a need to restore public trust in a troubled court system. Moreover, Judge Feikens' act of approving Guercio's termination was an exercise of judicial power under 28 U.S.C. § 332(d). Thus, the court of appeals erred in rejecting Judge Feikens' absolute judicial immunity defense in reliance on *Forrester*. Because the court of appeals reached a correct result, i.e., dismissal of Guercio's complaint, albeit for other reasons, Judge Feikens' entitlement to absolute immunity simply represents an additional ground for denying the petition for certiorari.

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[4] Indeed, a reasonable judge in Judge Feikens' position would have had reason to believe that his role in carrying out this responsibility came within the protections afforded by absolute immunity, an additional reason why, even if this Court were of the view that absolute immunity should not extend this far, qualified immunity should protect Judge Feikens from liability for his role in Guercio's termination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 10, 1991

APPENDIX A

BANKRUPTCY JUDGE MERIT SCREENING COMMITTEE REPORT on BANKRUPTCY JUDGE HARRY G. HACKETT

To: Honorable George Edwards, Chief Judge
United States Court of Appeals for the Sixth Circuit

Section 404 (b) of the Bankruptcy Reform Act, P.L. 95-598 provides for the establishment of Merit Screening Committees to advise the Chief Judge of the circuit regarding the qualifications to remain in office of incumbent bankruptcy judges whose terms of office expire between October 1, 1979 and March 31, 1984. Under the Provisions of that section of the Act the term of office of an incumbent bankruptcy judge automatically is continued until March 31, 1984 unless the Chief Judge of the circuit finds the bankruptcy judge to be not qualified after consultation with a Merit Screening Committee.

Section 404(c) of the Act provides for the establishment of the Merit Screening Committee. For each state there shall be established a Merit Screening Committee composed of the President or the designee of the President of the State Bar Association, the Dean or the designee of the Dean of a law school located within the state and the President or the designee of the President of a local bar association for the official headquarters location of the incumbent bankruptcy judge. Section 404(c) further provides that the Merit Screening Committee shall be organized and summoned to meetings by the Circuit Executive.

The term of office of Bankruptcy Judge Harry G. Hackett of Detroit, Michigan expires on June 30, 1981.

Judge Hackett was appointed as bankruptcy judge on July 1, 1957. He received his undergraduate and his law degrees from Wayne State University in 1949 and 1952, respectively. He has been admitted to practice in state and federal courts in Michigan. He engaged in private practice of law from 1952 until 1954 when he was appointed law clerk to the Honorable Frank A. Picard, U.S. District Judge for the Eastern District of Michigan. He served a [sic] Judge Picard's law clerk until his appointment as bankruptcy judge in 1957. Judge Hackett is 58 years of age and reports that he is in excellent health.

On January 14, 1981 a Merit Screening Committee for Bankruptcy Judge Hackett was organized by the Circuit Executive. Invitations to serve on the committee were issued to Dean S. Lewis, President, State Bar of Michigan, Wolfgang Hoppe, President, Detroit Bar Assocation [sic] and Terrance Sandalow, Dean, University of Michigan Law School. Mr. Lewis designated Joseph L. Hardig, Jr. of Birmingham, Michigan to serve on the committee. Mr. Hoppe and Dean Sandalow accepted the invitation and served on the committee.

The Merit Screening Committee held its first meeting on March 3, 1981 at Detroit, Michigan. It was agreed that the following general criteria would be used by the committee in determining whether this incumbent bankruptcy judge is qualified to remain in office: (1) health; (2) judicial temperament; (3) knowledge of the law and procedure; (4) industry and productivity; and (5) observance of the canons of ethics.

The committee further determined at the first meeting that the following procedures were necessary for the

proper discharge of its duty: (1) public notice of the formation of the committee, its purpose and a request for submission of written statements of views by any interested persons; (2) surveys of bar associations or attorneys knowledgeable in the area of practice within the territorial jurisdiction of the bankruptcy judge; (3) completion by the bankruptcy judge of a detailed questionaire; (4) solicitation of the views of the district judges of the district; and (5) a personal interview with the incumbent bankruptcy judge under review.

The committee followed each of the procedures and inquired into each of the areas outlined above. A notice inviting comment on Judge Hackett's qualifications to remain in office was submitted for publication to the State Bar of Michigan, the Detroit Bar Association, the Wolverine Bar Association, the Oakland County Bar Association and the Macomb County Bar Association. Notices also were submitted for publication in the *Detroit Legal News*, the *Pontiac-Oakland County Legal News* and *The Legal Advertiser* all legal newspapers in the greater Detroit area. Press releases regarding the formation of the committee, its purpose and its request for comments from interested persons were issued to the *Detroit Free Press*, the Detroit *News*, the *Michigan Chronicle*, *The Macomb Daily* and the *Daily Tribune* of Royal Oak, Michigan. At the committee's request Judge Hackett completed a detailed questionaire [sic] which included a number of opinions written by him. As a result of certain information received by the committee regarding an investigation by the FBI into possible criminal conduct involving employees and practitioners in the bankruptcy court, the committee requested from the United States Attorney for

the Eastern District of Michigan any information in his files which might be subject to disclosure and relevant to the committee's inquiry. The United States Attorney agreed to provide non-grand jury materials in his files consisting primarily of FBI reports of witness statements provided that Judge Hackett execute a waiver of his Privacy Act right of nondisclosure of such information. Upon request of the committee Judge Hackett gave the committee such a waiver and the United States Attorney provided the requested information.

The committee also invited comments from all of the district judges for the Eastern District of Michigan. At the invitation of the committee Chief Judge John Feikens of the United States District Court for the Eastern District of Michigan met with the committee to discuss Judge Hackett's qualifications at a meeting of the committee held in Ann Arbor, Michigan on April 28, 1981. Another meeting of the committee was held in Detroit, Michigan on May 29, 1981, at which time the committee interviewed Judge Hackett. The final meeting of the committee was held in Ann Arbor, Michigan on June 8, 1981.

Judge Hackett's response to the questionaire [sic], the comments of the members of the bar, the information provided by the United States Attorney and all other papers relating to the proceedings of the committee are in the files of the Circuit Executive and may be examined more fully by you if you so desire.

The comments and other information received by the committee show Judge Hackett to be a man of many facets. Many members of the bar had high praise for Judge Hackett's performance as a bankruptcy Judge.

Many members of the bankruptcy bar consider Judge Hackett to be fair, efficient and productive in the administration of his docket. It appears that many attorneys prefer to appear before him because of his pragmatic approach and because they believe that he is a fair and competent bankruptcy judge. There appears to be no question that Judge Hackett is knowledgeable in the substantive law and procedure of bankruptcy.

In addition to the positive information outlined above, however, the committee received substantial information raising serious questions about Judge Hackett's conduct on and off the bench. Of particular concern is Judge Hackett's relationships with certain attorneys and parties appearing before him in bankruptcy court. These relationships give rise to serious problems regarding Judge Hackett's observance of the provisions of the canons of ethics relating to the integrity and appearance of impartiality in the bankruptcy court.

With respect to much of the conduct outlined below the committee was faced with some degree of factual dispute. It is clear that the Congress did not intend for merit screening committees to conduct adversary proceedings to resolve such disputes. The committee has no authority to issue process, to examine witnesses under oath or to provide the opportunity for cross examination of witnesses. Nevertheless the committee must weigh the information which it has received and make some basic credibility judgments. Where the information coming to the committee is sharply disputed from a number of sources as to the fact of occurrence or non-occurrence of the conduct, the committee has made no ultimate determination but has simply reported to you the existence of

such information in the files. In other areas of conduct outlined in this report the committee, after reviewing all of the various sources of information and the degree of dispute over basic facts, has concluded that it can make determinations of the existence of substantial evidence to support the allegations of misconduct.

One of the most serious allegations relating to Judge Hackett's relationships with attorneys practicing before him, and for which the committee has concluded that there is substantial evidence, is the charge that Judge Hackett permitted attorneys appearing before him to make gifts to female employees of the bankruptcy court with whom Judge Hackett was maintaining a relationship. For example, the committee was presented with substantial evidence that Irving August, a prominent bankruptcy attorney who frequently appeared before Judge Hackett and who has been awarded large fees by Judge Hackett, offered to the female deputy clerk with whom Judge Hackett had a relationship $15,000 to be used as a down payment on a condominium and did give her a check in the amount of $1,000 to be used to secure her offer to purchase. There also was substantial evidence that John Dougherty, another prominent bankruptcy attorney who also is the standing trustee for Chapter 13 cases, paid for the female employee's air fare to Atlanta and return so that she could join Judge Hackett and Mr. Dougherty who had traveled together to Atlanta and purchased a tire for her automobile. The committee has concluded that these payments were made with Judge Hackett's knowledge and approval.

Several other allegations supported by substantial evidence were received by the committee regarding Judge

Hackett's relationship with attorneys, trustees, receivers and parties appearing before him. While the exact number of such occurrences is in dispute, there appears to be no question from the information received by the committee that Judge Hackett lunched and played golf on numerous occasions with Irving August. On at least one occasion Judge Hackett took a weekend golfing trip with Irving August and two female court employees. It also appears clear that the social relationship between Judge Hackett and Irving August was sufficiently well known to give the impression of, and for many court employees and practitioners to have a reasonable belief in, the ability of Irving August to receive special treatment from Judge Hackett. This appearance of special treatment extended from the size of fees awarded by Judge Hackett to the special status accorded Irving August in his dealings with the bankruptcy court's clerk's office in matters such as his ready access to the general office, the Xerox machine and office telephones, privileges not accorded members of the bar, generally.

The committee also must bring to your attention the existence of a series of broadcasts on radio station WJR in Detroit regarding Judge Hackett and the bankruptcy court in general and a current FBI investigation into possible criminal conduct by employees and attorneys connected with the bankruptcy court. Transcripts of the WJR series are in the files of the circuit executive and may be more fully examined by you if you so desire. Those broadcasts raise many of the same allegations of conduct on the part of Judge Hackett which are raised in this report. The WJR broadcasts also deal with the FBI investigation which is focusing on apparent manipulation

of the blind draw assignment system for bankruptcy cases. During a one year period from October 1979 to October 1980 the intake and assignment function primarily was the responsibility of one Kathy Bogoff. During this time Miss Bogoff was involved in a relationship with Irving August and appears to have received substantial funds and gifts from him. For the year that Miss Bogoff served as intake deputy over half of Irving August's Chapter 11 cases were assigned to Judge Hackett, and only ten percent were assigned to Judge Brody who Irving August wished to avoid because of dissatisfaction with the amount of fees approved by Judge Brody. The remaining 35% of Irving August's Chapter 11 cases were assigned to Judge Patton, but it should be noted that the investigation has disclosed many instances of Judge Hackett acting for Judge Patton without a formal reassignment of the case. The investigation is continuing into allegations that Judge Hackett may have received money or gifts from Irving August in exchange for some participation or approval of this scheme and allegations that Irving August may have made payments of money or gifts for and on behalf of Judge Hackett to female employees of the court with whom Judge Hackett has had relationships.

It is not possible or appropriate for the committee to attempt to resolve the validity of the allegations of possible criminal conduct. The investigation and final resolution of those matters will continue by the appropriate authorities. While the committee has not looked into this matter from the standpoint of assessing responsibility for the apparent manipulation of the assignment of cases, it does appear to the committee that all three bankruptcy

judges in Detroit must bear some responsibility for permitting Miss Bogoff to remain in the sensitive position involving the assignment of cases in light of her well known involvement with Irving August.

From the information available to it the committee believes that there is a reasonable basis for the FBI investigation which is grounded in part on the same kinds of conduct by Judge Hackett outlined in this report such as the apparent special relationship between Irving August and Judge Hackett which give rise to serious questions of integrity and impartiality in the bankruptcy court.

Other substantial evidence relating to social relationships raising the appearance of impropriety between attorneys and parties appearing before Judge Hackett was received by the committee. On one instance Judge Hackett was alleged to have played golf with an officer of a debtor corporation who was scheduled to appear before Judge Hackett in a contested matter involving disposition of assets of the corporation, and as indicated above, Judge Hackett took a trip with John Dougherty, a prominent bankruptcy practitioner and a female court employee.

There also came to the attention of the committee instances of Judge Hackett's handling of cases which raise questions of propriety. A most serious question was raised in relation to the matter of fees in a major reorganization case in which the receiver, an attorney, filed a petition for interim fee. the creditors were notified by the court in the usual course of business of the filing of the fee petition with a form notice which stated that a petition had been filed requesting a fee in the amount of

$50,000. The attorney for one of the creditors requested and received from the receiver a copy of the petition, and that copy also showed the amount requested to be $50,000. Based on an understanding that the interim fee requested by the receiver was $50,000 and represented compensation for services performed from the date of his appointment until the date of the petition, a period of nine months, the creditor decided not to object to the fee petition. The creditor was not served with a copy of the order allowing the fee and only learned some six months later that Judge Hackett had authorized a fee of $75,000 for the receiver and had allocated that amount to the receiver's first four months or service. The official court record in the case contains a petition signed by the receiver requesting a fee in the amount of $75,000, although both the court notice of the filing of the fee petition and the copy of the fee petition given to the attorney for the creditor show the amount requested to be $50,000. The court records also show that the creditor specifically raised this discrepancy in a written objection to a second fee petition filed by the receiver, but the issue was not dealt with by Judge Hackett in his opinion and order approving the second interim fee petition. Other instances of actions in cases which raise questions of propriety include apparent changes in the terms and conditions of sales of property from bankruptcy estates and the apparent setting aside of orders previously entered by another bankruptcy judge. There also were substantial allegations of ex parte contacts wtih [sic] attorneys and parties in cases before him.

Canon 2 of the Code of Conduct for United States Judges, which also is applicable to bankruptcy judges,

states: "A Judge should avoid impropriety and the appearance of impropriety in all his activities.

"A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

"A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. . . . "

Without expressing any opinion whatsoever on the merits of the allegations of criminal conduct on the part of anyone involved in the investigation, the committee concludes that Judge Hackett's conduct on and off the bench in his relationships with attorneys, parties and employees of the courts demeans the integrity of the court system and creates the appearance of impropriety. As noted in the official commentary to Canon 2 of the Code of Conduct, "(A Judge) must expect to be the subject of constant public scrutinity [sic]. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." A bankruptcy judge's observance of the Canons with respect to the appearance of propriety is especially important in view of his authority and discretion to fix fees of attorneys practicing before him.

Substantial evidence also was received by the committee of numerous instances of Judge Hackett being inebriated during and after working hours in restaurants

and bars in the environs of the federal courthouse which often were frequented by attorneys and court employees. The evidence shows that on at least some of those occasions Judge Hackett engaged in conduct unbecoming to a judge.

The committee also received some evidence that Judge Hackett on occasion performed judicial duties on the bench and in chambers in an inebriated condition. Affidavits were received by the committee stating that Judge Hackett was visibly intoxicated in conducting a hearing in chambers on a proposed sale of assets from an estate. These affidavits were disputed, however, by other persons present at that hearing. In addition, the committee received information from some court employees and members of the bankruptcy bar that Judge Hackett never appeared on the bench in an intoxicated condition. This information was countered by information from other court employees that afternoon proceedings before Judge Hackett often had to be postponed or cancelled because Judge Hackett returned from lunch in an inebriated condition.

In his interview with the committee Judge Hackett stated that he feels he has no problem with the use of alcohol. He did acknowledge the existence of instances of excess drinking in restaurants and bars around the courthouse after working hours. He further stated that it is his practice not to drink alcohol with lunch if he has court proceedings scheduled for the afternoon.

Canon 1 of the Code of Conduct for United States Judges states: "A Judge should uphold the integrity and independence of the Judiciary." The commentary to the

Canon provides that "A judge should . . . establish . . . , maintain . . . and enforc(e) and should himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved."

The committee finds substantial evidence to support the allegations that Judge Hackett was on numerous occasions inebriated and engaged in unbecoming conduct in restaurants and bars in the area of the federal courthouse. The committee further finds that such conduct is not consistent with the high standards of conduct which would uphold the integrity of the judiciary that is required by Canon 1 of the Code of Conduct.

As noted above the committee met with Chief Judge John Feikens of the District Court at a meeting on April 28, 1981. As Chief Judge of the District Court Judge Feikens expressed the view that by reason of the same kinds of conduct outlined herein, of which Judge Feikens was independently aware, Judge Hackett is not qualified to remain in office after the expiration of his present term, and he recommended that the committee find Judge Hackett not qualified to remain in office.

One of the purposes of the Bankruptcy Reform Act of 1978 was to enhance the status of the bankruptcy court system. It will be given virtual independent status by 1984. The merit screening process must be viewed as a part of the general effort by Congress to enhance the public confidence in the competence and integrity of the bankruptcy courts. In view of the substantial evidence of conduct on the part of Judge Hackett which would tend to, and has had the predictable result of, diminished public confidence in the integrity and impartiality of the

bankruptcy court, the committee concludes that it would be in the best interest of the judiciary if Judge Hackett does not remain in office beyond his present term. Because of the substantial evidence of conduct outlined herein which is in apparent disregard of the Canons of the Code of Conduct, the committee recommends to Chief Judge Edwards that he find Judge Hackett not qualified to remain in office after the expiration of his present term on June 30, 1981.

RESPECTFULLY SUBMITTED

/s/ Joseph L. Hardig, Jr.
Joseph L. Hardig, Jr.
State Bar of Michigan

/s/ Wolfgang Hoppe
Wolfgang Hoppe, President
Detroit Bar Association

/s/ Terrance Sandalow
Terrance Sandalow, Dean
University of Michigan
Law School

June 11, 1981

APPENDIX B

FINDINGS AND REPORT OF GEORGE EDWARDS, CHIEF JUDGE OF THE SIXTH JUDICIAL CIRCUIT IN RE HARRY G. HACKETT, JUDGE U.S. BANKRUPTCY COURT, EASTERN DISTRICT OF MICHIGAN

The final responsibility concerning the continuance or termination of a judicial career is not an easy burden. The maintenance of the integrity of the federal courts is, however, the most important duty of the Chief Judge of any federal circuit.

Under these circumstances, I cannot and I have not simply accepted the recommendation of the highly responsible Merit Screening Committee which has been designated under the Bankruptcy Reform Act to pass upon Judge Hackett's continuance on the bench. On the contrary, I have made a most careful personal review of the entire record accumulated by the Circuit Executive on behalf of the Merit Screening Committee, the investigation of the Administrative Office of the United States Courts, the reports furnished the Committee by the FBI under Judge Hackett's waiver of his right of privacy, and the report of the Committee. The following are my findings:

There are 45 letters of support of Judge Hackett's continuance on the bench in the Bankruptcy Court. Appropriately, they have been furnished by members of the Michigan Bar Association who practice before the Bankruptcy Court, and others who have direct contact with it. These letters attest to Judge Hackett's knowledge of the bankruptcy law, his courtesy to parties and counsel

before him in court, and to his record for industry in the 24 years he has been on the bench. He is described by some as the "workhorse" of the Bankruptcy Court. While some of these letters may well be motivated by self-interest, there are too many from too many diverse sources for these affirmative comments to be set aside. I accept the evaluations recited above as generally well founded.

Unfortunately, there is a completely different side to this story which has led the Merit Screening Committee to recommend to me that I find Judge Hackett not qualified to remain in office after completion of his present term on June 30, 1981. The Committee's report and reasons therefor are attached.

There is proof that a system of "blind draw" case assignment in the Clerk's office of the Bankruptcy Court was completely frustrated. More Chapter 11 cases filed by certain Lawyers (notably Attorney Irving August) were assigned to Judges Hackett and Patton than is consistent with any "blind draw" probability. Many of Judge Patton's assignments subsequently were handled by Judge Hackett.

There is strong evidence of financial and social favors being extended from August to assignment clerk Bogoff, a frequent social companion of August, who, beginning in October 1979, handled most of the case assignments.[1] All of such favors are apparently in violation of Cannon 7

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[1] This report is being called to the attention of the Michigan Bar Association.

(D.R. 7-110 Michigan Code of Professional Responsibility[2]). This relationship was so widely known in the Bankruptcy Court that it is my opinion that Judge Hackett and the other Judges had a duty to be aware of the matter and that he and the other Judges had a duty promptly to correct the problem and failed to do so.

There is evidence that Attorney August received $400,000 in fees approved by Bankruptcy judges during the first nine months of 1980. Many of these fees were approved by Judge Hackett. Judge Hackett and Attorney August were in frequent social contact during 1980 both in and outside of Detroit.

There is evidence of largess on the part of Judge Hackett which is difficult to reconcile with any known source of income.

There is strong evidence that gifts, entertainment, travel costs and money have been tendered to and received by strategically placed Bankruptcy Court employees by lawyers practicing before Judge Hackett, with his knowledge and apparent approval.

There is considerable evidence that favored employees of the Bankruptcy Court have been able to purchase assets of bankrupt estates for nominal sums by private sale practices known to and authorized by Judge Hackett.

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[2] D.R. 7-110 reads: "(A) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal."

There is evidence of Judge Hackett's committing serious indiscretions involving boisterous conduct and abusive language to women, tending to bring the federal judiciary into disrepute, sometimes in the confines of the Bankruptcy Court and more frequently in bars and restaurants nearby.

While much of this record calls for and is receiving careful review by the United States Attorney and the Federal Bureau of Investigation as to possible violations of federal law, no such charges have been made as to Judge Hackett, or any other Bankruptcy Judge, and no implications of violation of law are being or have been relied on by the Merit Screening Committee or by me.

What does appear clear to me is that the findings above represent repeated transgressions of Canons 1 and 2 of the Code of Conduct applicable to judges of the United States Courts, including Bankruptcy Judges.

These Canons (and official comment thereon) are as follows:

PART L CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES[1]

CANON 1

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge

[1]By resolution of the Judicial Conference of the United States this Code has been made applicable to Bankruptcy Judges and to United States Magistrates.

should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

COMMENTARY

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

I recognize that the widespread nature of at least some of the problems cited above may reflect upon other

members of the Bankruptcy Court and other lawyers practicing there. This report and that of the Merit Screening Committee are, however, directed solely to the question of Judge Hackett's qualifications to continue in office and to the degree possible are confined thereto.

The appreciation of this Circuit is expressed to the distinguished members of the Merit Screening Committee who spent many hours and probably some restless nights upon their study and report.

For the reasons outlined above, in accordance with the duty imposed on me by the Bankruptcy Reform Act., P.L. 95-598, and in accordance with the recommendations of the Merit Screening Committee, I find that Judge Harry Hackett is unqualified to remain in office as Judge of the Bankruptcy Court of the Eastern District of Michigan after the expiration of his present term on June 30, 1981.

6/24/81
Date

/s/ George Edwards
George Edwards
Chief Judge

APPENDIX C

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT

In the matter of:
Clerk of the Bankruptcy Court
Eastern District of Michigan

By a companion order entered today the Council has directed that William Harper be suspended from the performance of his duties as Clerk of the Bankruptcy Court for the Eastern District of Michigan and that he be placed on administrative leave with pay pending the disposition of the indictment returned against him by a grand jury in the Eastern District of Michigan charging a violation of 18 U.S.C. 154, prohibited purchase from the estate of a bankrupt.

The Council concludes that the effective and expeditious administration of the business of the courts within this circuit requires that the administration of the Bankruptcy Court for the Eastern District of Michigan be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision should include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court.

It is therefore ordered that, until further order of this Council, the administration of the Bankruptcy Court for the Eastern District of Michigan shall be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision shall include the oversight of the general operation of the

Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court.

FOR THE COUNCIL

_____

Chief Judge

May 6, 1981

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

IN THE MATTER OF

BANKRUPTCY COURT
FOR THE EASTERN
DISTRICT OF MICHIGAN

_____/

Miscellaneous
No. 81 330

The Judicial Council of the United States Court of Appeals for the Sixth Circuit having entered an order on May 6, 1981, which provides in part:

> "It is therefore ordered that, until further order of this Council, the administration of the Bankruptcy Court for the Eastern District of Michigan shall be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision shall include the oversight of the general operation of the Bankruptcy Court Clerk's office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court."

IT IS ORDERED, effective May 6, 1981, that John Feikens, the Chief Judge of this Court, be, and he is hereby, authorized to implement the provisions of the order of the Judicial Council above stated.

Dated: May 18, 1981

/s/ Thomas P. Thornton
THOMAS P. THORNTON
U.S. DISTRICT JUDGE

/s/ Ralph M. Freeman
RALPH M. FREEMAN
U.S. DISTRICT JUDGE

/s/ Philip Pratt
PHILIP PRATT
U.S. DISTRICT JUDGE

/s/ Robert E. De Mascio
ROBERT E. DE MASCIO
U.S. DISTRICT JUDGE

/s/ Charles W. Joiner
CHARLES W. JOINER
U.S. DISTRICT JUDGE

/s/ James Harvey
JAMES HARVEY
U.S. DISTRICT JUDGE

/s/ James P. Churchill
JAMES P. CHURCHILL
U.S. DISTRICT JUDGE

/s/ Ralph B. Guy, Jr.
RALPH B. GUY, JR.
U.S. DISTRICT JUDGE

/s/ Julian Abele Cook, Jr.
JULIAN ABELE COOK, JR.
U.S. DISTRICT JUDGE

/s/ Patricia J. Boyle
PATRICIA J. BOYLE
U.S. DISTRICT JUDGE

/s/ Stewart Newblatt
STEWART NEWBLATT
U.S. DISTRICT JUDGE

/s/ Avern Cohn
AVERN COHN
U.S. DISTRICT JUDGE

/s/ Anna Diggs Taylor
ANNA DIGGS TAYLOR
U.S. DISTRICT JUDGE

/s/ Horace W. Gilmore
HORACE W. GILMORE
U.S. DISTRICT JUDGE